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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. ——

FEDERAL TRADE COMMISSION, PETITIONER

v.

TRAVELERS HEALTH ASSOCIATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Acting Solicitor General, on behalf of the Federal Trade Commission, prays that a writ of certiorari issue to review the judgment entered by the United States Court of Appeals for the Eighth Circuit in the above cause on January 13, 1959, vacating a Commission order.

OPINION BELOW

The opinion of the Court of Appeals (Appendix A, *infra*, pp. 13–21) is reported at 262 F. 2d 241.

JURISDICTION

The judgment of the Court of Appeals (Appendix B, *infra*, p. 22) was entered on January 13, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the McCarran-Ferguson Act deprives the Federal Trade Commission of jurisdiction to prohibit unfair and deceptive practices by an insurance company doing an interstate business solely by mail, where the state in which it is incorporated and maintains its home office prohibits unfair or deceptive practices in the insurance business there or "in any other State."

STATUTES INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 66 Stat. 632, 15 U.S.C. 45, provides in relevant part:

> (a)(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> * * * * *
>
> (6) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

The Act of March 9, 1945, 59 Stat. 33, as amended, 61 Stat. 448, 15 U.S.C. 1011–1015 (referred to herein as the McCarran-Ferguson Act), provides in relevant part:

> SEC. 2. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulat-

ing the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided,* That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

Section 44–1503 of Nebraska Revised Statutes (1943), as amended by the emergency Act of May 14, 1957 (Nebraska Revised Statutes, 1957 Cumulative Supplement) provides:

> No person shall engage in this state in unfair methods of competition or in unfair or deceptive acts and practices in the conduct of the business of insurance. *No person domiciled in or resident of this state shall engage in unfair methods of competition or in unfair or deceptive acts and practices in the conduct of the business of insurance in any other state, territory, possession, province, country, or district.* [The amending language of the "emergency" Act is italicized.]

STATEMENT

On October 14, 1954, the Federal Trade Commission issued a complaint charging that Travelers Health Association, a health insurance company incorporated in Nebraska and carrying on an interstate business by mail from its Omaha office, had falsely advertised its policies in soliciting new members, in violation of Section 5 of the Federal Trade Commis-

sion Act, 15 U.S.C. 45 (App 6–12).[1] After full administrative proceedings, the Commission, affirming the examiner's initial decision (App. 18–40), held in December 1956 that it had jurisdiction over the advertising practices of the respondent and that the advertising was misleading in three respects,[2] and ordered respondent to cease and desist from making such misrepresentations (App. 41–49).

The Commission ruled (App. 52) that, for the reasons previously stated in its opinion in *American Hospital and Life Insurance Company* (Docket No. 6237),[3] it had not been ousted of jurisdiction over respondent's mail-order business by Section 2(b) of the McCarran-Ferguson Act (*supra,* pp. 2–3), which makes insurance subject to Commission regulation "to the extent that such business is not regulated by State law." Chairman Gwynne, who had dissented on the jurisdictional issue in the *American Hospital* case and who, as a member of Congress, had been an active participant in the debates leading to passage of the McCarran-Ferguson Act (see 91 Cong. Rec. 1089–1090), concurred separately on the ground, *inter alia,* that "a law purporting to protect the people *of another state* from deceptive advertising can

[1] "App." refers to the printed appendix in the Court of Appeals.

[2] The misleading representations related to the failure to refer to the insurer's right to terminate the policy whenever it sees fit; the amounts of benefits payable and extent of coverage; and the conditions concerning the insured's health at the time of issuing the policy.

[3] The Court of Appeals' reversal of the Commission's order in the *American Hospital* case was sustained by this Court in *Federal Trade Commission* v. *National Casualty Co.*, 357 U.S. 560.

hardly be said to be the type of law referred to in Section 2(b) of the McCarran Act" (App. 60).

Respondent filed a petition to review in the Court of Appeals for the Eighth Circuit, but after briefing and argument decision was deferred pending the decision of this Court in *Federal Trade Commission* v. *National Casualty Company*, 357 U.S. 560.[4] Following that decision, and after further briefing and argument, the Court of Appeals held, by a divided court, that the instant case was indistinguishable from *National Casualty, supra*, and vacated the Commission's order on the ground that the Commission is "without authority to regulate the practices of the petitioner in soliciting insurance" (*infra*, p. 20).

The court ruled that under the Nebraska insurance law, which prohibits any Nebraska resident or domiciliary from engaging in unfair or deceptive acts or practices in conducting the business of insurance "in this state" or "in any other state" (*supra*, p. 3), respondent's "advertising practices * * * are regulated by State law within the letter and spirit of the McCarran-Ferguson Act, and that the Act has placed such practices beyond the regulatory power of the Commission" (*infra*, p. 20). Judge Vogel, dissenting, denied that the "after-the-fact amendment of the Nebraska Code to include deceptive practices "in

[4] During the period this case was pending upon appeal, the State of Nebraska amended its insurance laws to give it regulatory authority over the advertising practices of domiciliary insurers "in the conduct of the business of insurance in any other state * * *." See page 3, *supra*.

any other state' is the kind of regulation by state law Congress had in mind"; stated that it was "impractical and ineffective" to "force the citizens of other states to rely upon Nebraska's regulation of the long distance advertising practices" of respondent in selling insurance outside Nebraska; and concluded that since respondent's "mail order business is not regulated and cannot be regulated by the laws of the states whose citizens are subjected to the mail disseminated advertising * * * the order of the Federal Trade Commission falls squarely within the purview of the Section 2(b) proviso of the McCarran-Ferguson Act and should be sustained" (*infra*, pp. 20–21).

REASONS FOR GRANTING THE WRIT

1. This case presents an important question with respect to the Federal Trade Commission's authority to prohibit deceptive advertising by insurance companies doing an interstate business solely by mail. That question was left undecided by this Court's ruling last term in *Federal Trade Commission* v. *National Casualty Company*, 357 U.S. 560. In that case the Court held that the provisions of Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. 1011, *et seq.*, divested the Commission of jurisdiction over the advertising of insurers doing business in a state through local agents, where the state has enacted a statute regulating the advertising within its borders. The Court was careful to note in that case, however, that "only an insubstantial amount of any advertising goes directly by mail from the company to the public" (357 U.S. at 562), and it stated (*id.* at 564):

> Whatever may have been the intent of Congress with regard to interstate insurance practices which the states cannot for constitutonal reasons regulate effectively, that intent is irrelevant in the cases before us. Respondents' advertising programs require distribution by their local agents, and there is no question but that the States possess ample means to regulate this advertising within their respective boundaries.

In the instant case, however, respondent's "advertising goes directly by mail from the company to the public" throughout the country; respondent is licensed to do business in only one state (Virginia) (*infra*, p. 18).

2. The court below was of the view that respondent's advertising practices were in fact "regulated by state law" within the meaning of Section 2(b) of the McCarran-Ferguson Act. It concluded that the insurance laws of Nebraska, particularly as amended in 1957, to prohibit Nebraska residents or domiciliaries from engaging in unfair or deceptive acts or practices in the conduct of insurance business "in any other state * * *", were "adequate to enable the Nebraska Insurance Department to deal effectively with any unfair advertising practice of the petitioner" (*infra*, p. 18), and that respondent's "practices in the solicitation of insurance by mail in Nebraska or elsewhere reasonably and realistically cannot be held to be unregulated by State law" (*infra*, p. 20).

Assuming *arguendo* the constitutionality of Nebraska's regulation of the practices of a domiciliary corporation in soliciting business through the mails in

other states (cf. *Robertson* v. *California,* 328 U.S. 440; *McGee* v. *International Life Insurance Co.,* 355 U.S. 220), we submit that such regulation by a single state of the advertising practices of a company which does business by mail throughout the country does not constitute the kind of regulation "by State law" that Congress intended would confer immunity from federal regulation. For, as Judge Vogel pointed out in his dissenting opinion (*infra,* pp. 20–21), respondent's advertising "is not regulated and cannot be regulated by the laws of" the states to which respondent mails its advertising but in which it neither is licensed to do business nor has any agents; and it would be "impractical and ineffective" to "force the citizens of [those] other states to rely upon Nebraska's regulation of the long distance advertising practices" of respondent.

Both the language of the McCarran-Ferguson Act and its legislative history make it clear that federal regulatory authority was to be inapplicable to the insurance business only to the extent that the individual states regulated such business. Thus, in Section 1 of the Act "Congress declare[d] that the continued regulation and taxation by the several States of the business of insurance is in the public interest and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States" (15 U.S.C. 1011). Similarly, Section 2(a) of the Act states that "The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regu-

lation or taxation of such business" (15 U.S.C. 1012(a)); and Section 2(b), to which the exemption clause is a proviso, states that "No Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any State for the purpose of regulating the business of insurance * * *" (15 U.S.C. 1012(b)).

During the Senate debates on the Conference Report on the bill, Senator O'Mahoney, one of the conferees, stated that "there is not a line or sentence in the proposed act, as I have read it, which would delegate to any State the power to legislate in the field of interstate and foreign commerce. State regulation must be for the State and not for the United States. * * * Nothing in the proposed law would authorize a State to try to regulate for other States * * *" (91 Cong. Rec. 1483). Shortly thereafter, Senator Ferguson, one of the draftsmen of the bill, stated in response to an inquiry from Senator Pepper, "[i]f the Senator's statement was that the proposed act would permit a State to regulate interstate commerce—insurance is interstate commerce—in the various States, the State could not do it" (91 Cong. Rec. 1484).

In sum, Congress did not delegate to any one state the authority to regulate an interstate insurance business (see *United States v. South-Eastern Underwriters Association*, 322 U.S. 533). It merely "withdrew from the Federal Trade Commission the authority to regilate respondents' advertising practices in those States which are regulating those practices under their own laws." *Federal Trade Commission*

v. *National Casualty Co., supra* at 563. The kind of regulation imposed by Nebraska cannot effectively protect the inhabitants of the other states in which respondent solicits insurance by mail; it can effectively protect only the residents of Nebraska.

3. The court below also stated (*infra*, p. 19) that prior to the 1957 amendment "the Director of Insurance of Nebraska * * * had the power to regulate the practices of the petitioner in the solicitation of insurance in Nebraska and other states." Prior to that time, however, the Nebraska statute merely prohibited any person from engaging "in this state" in unfair or deceptive acts or practices in the insurance business.[5] It is difficult to see how this provision could have authorized the state to prohibit such practices outside its border. In any event, such purported regulation would still be subject to the basic vice that it could not effectively protect the citizens of the other states from misrepresentations made through the mails by insurance companies located outside such states and not subject to their regulatory jurisdiction.[6] Of necessity, the problem of preventing misrepre-

[5] As of December, 1958, 44 states had virtually identical statutory provisions; three others have substantially similar statutes.

[6] Virginia's "blue sky" law was held applicable to respondent's sales of insurance by mail in that state, even though it was not licensed and had no agents there. *Travelers Health Association v. Virginia*, 339 U.S. 643. But, unlike the Virginia "blue sky" law, state laws prohibiting unfair or deceptive acts or practices by insurance companies generally are not designed to reach out-of-state companies, not licensed in the state, engaged solely in a mail-order business. Indeed, respondent itself apparently recognizes the different scope of the Virginia "blue sky" law and the insurance laws of other states. For it has secured a license to do business in Virginia, but not in the other states (besides Nebraska) in which it does business (App. 7).

sentations by insurance companies doing business solely through the mails can be effectively dealt with only by the Federal Government.

4. The question is of substantial importance in the administration of the Federal Trade Commission Act. More than half of the 41 insurance companies whose advertising practices have been challenged as false and deceptive by Commission complaints filed since October 1954 solicit business exclusively by mail in one or more states in which they are not licensed and employ no agents. The volume of such mail order business in the accident and health insurance field is extensive and is increasing.[7] If the decision below is allowed to stand, we submit that the purchasers of this substantial volume of insurance which is sold in interstate commerce through the mails will be denied effective protection against false and misleading advertising practices. The correctness of a decision which would

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[7] While there are no available statistics as to the total national amount of accident and health insurance business which is done through mail contact with persons in states in which the insurance company is not licensed to do business, during 1956 over 72 million persons carried hospitalization insurance written by private insurance companies. 1958 Statistical Abstract of the United States, p. 480. This coverage produced an earned premium volume for that year of 3.1 billion dollars. *Id.* at 482.

The record in this case shows that the dollar volume of Travelers' premium receipts (including those from Nebraska) was $568,000 in 1952, $560,000 in 1953, and $548,000 in 1954 (App. 42). Total premiums received in 1956 on accident and health insurance by three other companies, doing a mail-order business exclusively (which are involved in pending Commission proceedings), amounted to $15,441,731 (*Commercial Travelers Mutual Accident Ass'n of America*, Docket No. 6242; $6,525,464 (Best's Ins. Rep. (Fire and Casualty) 1957, p. 100B); *Life Ins. Co. of America*, Docket No. 6247; $2,047,037 (Best's Life Ins. Rep.—1957, p. 766); *Guarantee Reserve Life Ins. Co.*, Docket No. 6243; $6,869,230 (Best's Life Ins. Rep.—1957, p. 598).

have such an adverse effect upon the public plainly calls for review by this Court.

CONCLUSION

For these reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

OSCAR H. DAVIS,
*Acting Solicitor General.**

VICTOR R. HANSEN,
Assistant Attorney General.

RICHARD A. SOLOMON,
JOHN C. DANIELSON,
Attorneys.

EARL W. KINTNER,
General Counsel,

JAMES E. CORKEY,
Assistant General Counsel,
Federal Trade Commission.

APRIL 1959.

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*In lieu of the Solicitor General, who is disqualified for personal reasons.

APPENDIX A

(Federal Trade Commission Docket 6252)

In the United States Court of Appeals for the Eighth Circuit.

No. 15743

TRAVELERS HEALTH ASSOCIATION, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

[January 13, 1959]

PETITION TO REVIEW ORDER OF FEDERAL TRADE COMMISSION.

C. C. Fraizer (T. J. Fraizer and Fraizer & Fraizer were with him on the brief) for Petitioner.

James E. Corkey, Assistant General Counsel, Federal Trade Commission (Earl W. Kintner, General Counsel, and J. B. Truly, Alvin L. Berman, Edwin S. Rockefeller and Frederick H. Mayer, Attorneys, Federal Trade Commission, were with him on the brief), for Respondent.

Clarence S. Beck, Attorney General of the State of Nebraska, and Ralph D. Nelson, Assistant Attorney General of the State of Nebraska, filed brief for the State of Nebraska, as Amicus Curiae, in support of Petitioner. Joinders in the Amicus Curiae brief of the State of Nebraska with respect to the question of the jurisdiction of the Federal Trade Commission were filed by the following: Bruce Bennett, Attorney General for the State of Arkansas;

John J. Bracken, Attorney General of the State of Connecticut; Richard W. Ervin, Attorney General for the State of Florida; Eugene Cook, Attorney General for the State of Georgia; Norman A. Erbe, Attorney General for the State of Iowa; Jo M. Ferguson, Attorney General, and Earle V. Powell, Assistant Attorney General, for the Commonwealth of Kentucky; Jack P. F. Gremillion, Attorney General for the State of Louisiana; Rufus D. Hayes, Commissioner of Insurance of the State of Louisiana; Frank F. Harding, Attorney General for the State of Maine; C. Ferdinand Sybert, Attorney General for the State of Maryland; Thomas M. Kavanagh, Attorney General of the State of Michigan; Fred M. Standley, Attorney General for the State of New Mexico; Louis J. Lefkowitz, Attorney General of the State of New York; Leslie R. Burgum, Attorney General for the State of North Dakota; T. C. Callison, Attorney General for the State of South Carolina; E. R. Callister, Attorney General for the State of Utah; Frederick M. Reed, Attorney General for the State of Vermont; Kenneth C. Patty, Attorney General for the Commonwealth of Virginia; Stewart G. Honeck, Attorney General of the State of Wisconsin; Thomas O. Miller, Attorney General for the State of Wyoming; Duke W. Dunbar, Attorney General of the State of Colorado.

Whitney North Seymour and Simpson, Thacher & Bartlett filed brief for The Health Insurance Association of America, as Amicus Curiae

Before SANBORN, JOHNSEN and VOGEL, *Circuit Judges*

SANBORN, *Circuit Judge:*

Travelers Health Association, of Omaha, Nebraska, by a petition to review, challenges the validity of a cease and desist order of the Federal Trade

Commission dated December 20, 1956. The order was based upon a determination by the Commission (1) that it had jurisdiction to regulate the advertising practices of the petitioner in the promotion and sale, by mail, of insurance against disability caused by sickness, and (2) that certain of the petitioner's practices were false, misleading and deceptive within the meaning of the Federal Trade Commission Act, 15 U.S.C. § 45, 15 U.S.C.A. § 45. The order under review prohibited the petitioner from carrying on the practices found by the Commission to be unlawful.

The petitioner contended before the Commission, and contends here: 1. That the Commission was precluded by the McCarran-Ferguson Act, 15 U.S.C. § 1011–1015, 15 U.S.C.A. § 1011–1015, from regulating the advertising practices of the petitioner, since its insurance business was subject to State laws "which relate to the regulation * * * of such business."[1] 2.

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[1] The pertinent portions of the McCarran-Ferguson Act, 59 Stat. 33, as amended, 61 Stat. 448, are as follows:

"That the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

"Sec. 2 (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several states which relate to the regulation or taxation of such business.

"(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Sherman Act, * * * the Clayton Act, and * * * the Federal Trade Commission Act * * * shall

That none of the advertising practices proscribed by the Commission was false, misleading or deceptive.

The case was first argued and submitted to this Court on November 13, 1957. Decision was deferred pending the disposition by the Supreme Court of the cases of *The American Hospital and Life Insurance Co.* v. *Federal Trade Commission*, 5 Cir., 243 F. 2d 719, and *National Casualty Company* v. *Federal Trade Commission*, 6 Cir., 245 F. 2d 883, to review which the Supreme Court granted certiorari on November 12, 1957. 355 U.S. 867. In those cases it was held by the respective Courts of Appeals that, because of the McCarran-Ferguson Act, the Federal Trade Commission had exceeded its jurisdiction in attempting to regulate the advertising practices of the insurers there involved. A reversal of those decisions would have settled the problem of the Commission's jurisdiction in its favor in the instant case. However, on June 30, 1958, the Supreme Court, in a Per Curiam opinion, affirmed the judgments in both cases. *Federal Trade Commission* v. *National Casualty Co.*, and *Federal Trade Commission* v. *American Hospital and Life Insurance Co.*, 357 U.S. 560, 78 S. Ct. 1260. In its opinion, the Supreme Court said of the McCarran-Ferguson Act (pages 562–563 of 357 U.S.):

> * * * An examination of that statute and its legislative history establishes that the Act withdrew from the Federal Trade Commission the authority to regulate respondents' [the insurers'] advertising practices in those States which are regulating those practices under their own laws.

At our direction, the question of the Commission's jurisdiction over the advertising practices of the peti-

be applicable to the business of insurance to the extent that such business is not regulated by State law."

tioner in the instant case was reargued and the case finally submitted on September 13, 1958.

The obvious purpose of the McCarran-Ferguson Act was to remove the cloud cast by the case of *United States* v. *South-Eastern Underwriters Association*, 322 U.S. 533, upon the right of the States to continue to regulate and to tax interstate insurance business under their own laws, as they had done for some seventy-five years. The history and effect of the Act has already been adequately explained. See *Prudential Insurance Co.* v. *Benjamin*, 328 U.S. 408, 429–431; *Maryland Casualty Co.* v. *Cushing*, 347 U.S. 409, 413; *North Little Rock Transportation Co., Inc.,* v. *Casualty Reciprocal Exchange*, 8 Cir., 181 F. 2d 174, 176; *American Hospital and Life Ins. Co.* v. *Federal Trade Commission*, 5 Cir., 243 F. 2d 719; *National Casualty Co.* v. *Federal Trade Commission*, 6 Cir., 245 F. 2d 883, 887–888; *Securities and Exchange Commission* v. *Variable Annuity Life Ins. Co. of America*, D.C. D.C., 155 F. Supp. 521, 527.

The petitioner asserts that its insurance business, including its advertising practices, is regulated by State law within the meaning of the McCarran-Ferguson Act, and that, under Section 2 (a) and (b) of the Act, the Commission is clearly without authority to do any additional or supplemental regulating of petitioner's advertising practices.

The Federal Trade Commission contends that the Supreme Court, in its decision of June 30, 1958, in the *National Casualty Co.* and *American Hospital and Life Insurance Co.* cases, merely held that the States possess ample means to regulate insurance advertising disseminated by companies licensed to do business in those States and represented by agents located within their boundaries; that the Court expressly refrained from ruling upon the applicability of the

McCarran-Ferguson Act to the mail order insurance business; that no amount of State regulation of insurance advertising can effectively stop the influx into a State of deceptive advertising material mailed by an out of State company doing a mail order insurance business; that, under the proviso of Section 2(b) of the McCarran-Ferguson Act, the Federal Trade Commission Act is applicable to the petitioner's advertising practices; and that the Commission has jurisdiction.

The Supreme Court, in its opinion of June 30, 1958, in the *National Casualty Co.* and *American Hospital and Life Insurance Co.* cases, decided no more than it was required to decide, and confined its opinion to the exact factual situation presented. That court, as the Commission says, was dealing with the advertising practices of insurers operating through agents in States in which the insurers were licensed. In the instant case the petitioner is licensed only in the States of Nebraska and Virginia. It sends letters soliciting insurance by mail throughout the United States. It has policyholders in every State in the Union, and all of its business is transacted through the mail at its home office in Omaha. It pays taxes to Virginia on premiums collected from its insureds in that State, but pays all other premium taxes to Nebraska. Since its incorporation in 1904, the petitioner has been supervised, regulated and periodically examined by the Insurance Department of the State of Nebraska. That the laws of that State are adequate to enable the Nebraska Insurance Department to deal effectively with any unfair advertising practice of the petitioner or of any other insurer domiciled in that State cannot be questioned.

The Nebraska "Unfair Competition and Trade Practices" Act of 1947 (Secs. 44-1501 to 44-1521,

Revised Statutes of Nebraska 1943, Reissue 1952) as amended in 1957 (Secs. 44–1501 et seq., Revised Statutes of Nebraska 1943, 1957 Cumulative Supplement) expressly prohibits an insurer domiciled in that State from engaging there or elsewhere in any "unfair or deceptive acts and practices in the conduct of the business of insurance." (§ 44–1503.) The Act empowers the Director of Insurance (1) to prefer charges against any such insurer if he has reason to believe that it has, in Nebraska or elsewhere, engaged "in any unfair or deceptive acts or practices in the conduct of such business," and to give the insurer notice of a hearing on the charges (§ 44–1506); (2) to take evidence at the hearing (§ 44–1507); and (3) to issue a cease and desist order if he determines that the insurer has engaged in the wrongful acts and practices with which it is charged. (§ 44–1509.)

At the time the Commission entered the order under review, the Nebraska Act did not expressly authorize the Director of Insurance to deal with unfair and deceptive trade practices engaged in, in other states, by an insured domiciled in Nebraska. That, we think, is of no substantial consequence. The validity of the order under review depends upon the law presently applicable. A substantial change in applicable law, occurring after the entry of an order or judgment, which alters the rule governing a case will ordinarily be given effect on review. See and compare, *Trapp v. Metropolian Life Insurance Co.*, 8 Cir., 70 F. 2d 976, 982, and cases cited. Moreover, we think the Director of Insurance of Nebraska at all times here involved had the power to regulate the practices of the petitioner in the solicitation of insurance in Nebraska and other states.

It must be kept in mind that the business of the petitioner was all done at or from its home office in

Omaha. There its solicitation material originated and was mailed; there the applications for insurance induced by solicitation were received; there all policy contracts were written; and there all premiums were paid. With every activity of the petitioner, in the conduct of its business, subject to the supervision and control of the Director of Insurance of Nebraska, we think that the petitioner's practices in the solicitation of insurance by mail in Nebraska or elsewhere reasonably and realistically cannot be held to be unregulated by State law.

In our opinion, there is no controlling distinction between the instant case and the *National Casualty Co.* and *American Hospital and Life Insurance Co.* cases. We think that the advertising practices of the petitioner are regulated by State law within the letter and spirit of the McCarran-Ferguson Act, and that the Act has placed such practices beyond the regulatory power of the Commission.

The order under review is vacated on the ground that the Federal Trade Commission is, and was, without authority to regulate the practices of the petitioner in soliciting insurance.

VOGEL, *Circuit Judge,* dissenting:

I do not dispute the majority's contention that "A substantial change in applicable law, occurring after the entry of an order or judgment, which alters the rule governing a case will ordinarily be given effect on review", but I do not believe here that the after-the-fact amendment of the Nebraska Code to include deceptive practices "in any other state" is the kind of regulation by state law Congress had in mind. To force the citizens of other states to rely upon Nebraska's regulation of the long distance advertising prac-

tices of the petitioner in the promotion and sale by mail or otherwise of insurance outside the State of Nebraska seems to me impractical and ineffective. This is much too frail a reed upon which to lean. The petitioner's mail order business is not regulated and cannot be regulated by the laws of the states whose citizens are subjected to the mail disseminated advertising. I believe the order of the Federal Trade Commission falls squarely within the purview of the Section 2(b) proviso of the McCarran-Ferguson Act and should be sustained.

APPENDIX B

In the United States Court of Appeals for the Eighth Circuit

No. 15743

September Term, 1958

TRAVELERS HEALTH ASSOCIATION, PETITIONER

v.

FEDERAL TRADE COMMISSION

PETITION TO REVIEW ORDER OF THE FEDERAL TRADE COMMISSION

This cause came on to be heard on the Petition to Review the Order of the Federal Trade Commission entered December 20th, 1956, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the said Order of the Federal Trade Commission under review in this cause be, and is hereby, vacated on the ground that the Federal Trade Commission is, and was, without authority to regulate the practices of the petitioner in soliciting insurance.

And it is further Ordered by this Court that this cause be, and it is hereby, remanded to the Commission for proceedings consistent with the majority opinion of this Court this day filed herein.

JANUARY 13th, 1959.

U. S. GOVERNMENT PRINTING OFFICE: 1959

No. ~~63~~ 51

IN THE

Supreme Court of the United States

October Term, 1959

FEDERAL TRADE COMMISSION, *Petitioner*

vs.

TRAVELERS HEALTH ASSOCIATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

October Term, 1958

No. 836

FEDERAL TRADE COMMISSION, *Petitioner*

vs.

TRAVELERS HEALTH ASSOCIATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Travelers Health Association, Respondent, files this brief in opposition to the Petition for a Writ of Certiorari filed by the Acting Solicitor General on behalf of the Federal Trade Commission, praying for review of the judgment entered by the United States Court of Appeals for the Eighth Circuit in the above cause on January 13, 1959, vacating a Commission order.

OPINION BELOW

The opinion of the Court of Appeals appears at Appendix A, pp. 13-21 of the Petition, and is reported at 262 F. 2d 241.

JURISDICTION

The judgment of the Court of Appeals which appears at Appendix B, p. 22 of the Petition, was entered on January 13, 1959. The Petition invokes the jurisdiction of the court under 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether the McCarran-Ferguson Act deprives the Federal Trade Commission of jurisdiction to prohibit alleged unfair and deceptive practices by a Nebraska domiciled insurance company mailing letters of solicitation to a selected list of "white collar workers" which letters are "not broadcast to the public but * * * addressed to individuals who have been recommended by (Travelers) policyholders." (App. 20 and App. 43). Respondent "does no newspaper or magazine advertising" (App. 43).

STATUTES INVOLVED

The references in the Petition to the Federal Trade Commission Act and the McCarran-Ferguson Act are accurate and will not be repeated here.

The Petition unduly narrows the consideration of Nebraska statutes involved. They actually are:

Section 44-101, Revised Statutes of Nebraska, 1943, Reissue of 1952, originally enacted in 1913, provides:

"Within the intent of this chapter, the business of

apportioning and distributing losses arising from specified causes among all those who apply and are accepted to receive the benefits of such service, is public in character, and requires that all those having to do with it shall at all times be actuated by good faith in everything pertaining thereto, shall *abstain from deceptive or misleading practices*, and shall keep, observe and practice the principles of law and equity in all matters pertaining to such business. Upon the insurer, the insured, and their representatives, shall rest the burden of maintaining proper practices in said business." (Emphasis supplied.)

The foregoing, as well as other Nebraska insurance statutes, is enforceable under the provisions of Section 44-125, Revised Statutes of Nebraska, 1943, Reissue of 1952 originally enacted in 1913, which provides:

> "Whenever any domestic company * * * has willfully violated * * * any law of this state * * * the department may apply to the district court, or any judge thereof, in the county or judicial district in which the principal office of such company is located, for an order directing such company to show cause why the department should not take possession of its property, records and effects, and conduct or close its business, and for such other relief as the nature of the case and the interest of its policy-holders, creditors, stockholders or the public may require."

Sections 44-750, 44-751 and 44-752, Revised Statutes of Nebraska, 1943, Reissue of 1952, enacted in 1947, provide:

> "44-750. SICKNESS AND ACCIDENT INSURANCE; MISLEADING OR DECEPTIVE ADVERTISING OR PLAN OF SOLICITATION; PROHIBITED. No company doing business in this state, and no insurance agent or broker shall use in connection with the solicitation of sickness and accident insurance any advertising copy or advertising practice or any plan of solicitation which is materially misleading or deceptive. An

advertising copy or advertising practice or plan of solicitation shall be considered to be materially misleading or deceptive if by implication or otherwise it transmits information in such manner or of such substance that a prospective applicant for sickness and accident insurance may be misled thereby to his material damage."

"44-751. SICKNESS AND ACCIDENT INSURANCE; MISLEADING OR DECEPTIVE ADVERTISING OR PLAN OF SOLICITATION; FINDING BY DIRECTOR OF INSURANCE; NOTICE OF HEARING. If the Director of Insurance finds that any such advertising copy or advertising practice or plan of solicitation is materially misleading or deceptive he shall order the company or the agent or broker using such copy or practice or plan to cease and desist from such use. Before making any such finding and order the director shall give notice, not less than ten days in advance, and a hearing to the company, agent, or broker affected."

"44-752. SICKNESS AND ACCIDENT INSURANCE; MISLEADING OR DECEPTIVE ADVERTISING OR PLAN OF SOLICITATION; HEARING; CEASE AND DESIST ORDER; SUSPENSION OR REVOCATION OF LICENSE. If the director finds, after due notice and hearing, that any authorized insurer, licensed insurance agent, or licensed insurance broker has willfully violated any such order to cease and desist he may suspend or revoke the license of such insurer, agent, or broker."

The Model Fair Trade Practice Act (which has been enacted in practically all of the states) is contained in Sections 44-1501, et seq. of Revised Statutes of Nebraska, 1943, Reissue of 1952, enacted in 1947, pertinent provisions thereof being quoted as follows:

"44-1501. INSURANCE; TRADE PRACTICES; REGULATION. The purpose of sections 44-1501 to 44-

1521 is to regulate the trade practices in the business of insurance, in accordance with the intent of Congress of the United States as expressed in Public Law 15 of the 79th Congress, by defining, or providing for the determination of, all acts, methods, and practices which constitute unfair methods of competition and unfair or deceptive acts and practices in this state, and to prohibit the same.

Source: Laws 1947, c. 170, Sec. 1, p. 507."

* * *

"44-1503. UNFAIR METHODS OF COMPETITION; DECEPTIVE ACTS AND PRACTICES; PROHIBITED. No person shall engage in this state in unfair methods of competition or in unfair or deceptive acts and practices in the conduct of the business of inurance."

"44-1504. UNFAIR METHODS OF COMPETITION; DECEPTIVE ACTS AND PRACTICES; ENUMERATION. The following are declared to be unfair methods of competition and unfair or deceptive acts and practices in the business of insurance:

(1) Making, issuing, circulating, or causing to be made, issued, circulated, any estimate, illustration, circular or statement misrepresenting the terms of any policy issued or to be issued or the benefits or advantages promised thereby; * * *"

(2) Making, publishing, disseminating, circulating, or placing before the public, * * * in the form of a notice, circular, pamphlet, letter or poster * * * an advertisement * * * which is untrue, deceptive or misleading."

Above Section 44-1503 was amended in 1957 (Nebraska Revised Statutes, 1957 Cumulative Supplement), by the addition, as stated in the Petition, of the following language:

"No person domiciled in or resident of this state shall

engage in unfair methods of competition or in unfair or deceptive acts and practices in the conduct of the business of insurance in any other state, territory, possession, province, country, or district."

STATEMENT

The "Statement" in the Petition is substantially accurate, subject to the following exceptions:

In mentioning the Commission's decision, which was overruled by the Court of Appeals, the concurring opinion of Commission Chairman Gwynne is referred to in the Petition (p. 4) with the statement that he, as a member of Congress, had been an active participant in the debates leading to the passage of the McCarran-Ferguson Act. He did so participate (91 Cong. Rec. 1089-1090), but there was no discussion whatever of the points at issue here. Any inference to the contrary is erroneous. Here follows what he actually said:

> "*Mr. Gwynne of Iowa.* Mr. Speaker, when the Supreme Court last year decided the Southeastern Underwriter case, it immediately made applicable to the business of insurance many laws that we have heretofore passed regulating interstate commerce. When we passed those acts, Congress did not have in mind insurance; as a matter of fact, when Congress passed the Sherman Act it was with the distinct understanding that it did not apply to insurance, because insurance at that time was not interstate commerce, under the Supreme Court decisions. The net result of the Supreme Court decision therefore was to put the Federal government in the field of control then being exercised by the States. The methods of control exercised by the States and by the Federal Government are conflicting, and the sole purpose of this bill is to take out as much of that conflict as possible until we can determine whether Congress will regulate insur-

ance, or whether it will permit the States to regulate it.

"* * * (H.R. 1973). It starts out with the statement that insurance shall be subject to State control. The Congress of course cannot delegate to the States the power to regulate insurance. What we are trying to do is to make it clear to the States and to the insurance companies that we are as far as possible removing ourselves from the field.

"The second thing the bill states is that no act of Congress governing interstate commerce shall apply to insurance unless the act specifically so states.

"The third section goes on to enumerate two acts. I believe section 3 is not necessary in the bill, but it was inserted, I suppose, to make it clear that the Federal Trade Commission Act should not apply to insurance and that the Robinson-Patman Act shall not apply to insurance. The reason is this: The Robinson-Patman Act was passed with the intent that it should regulate and control the sale of commodities. It was not meant to cover insurance any more than it was meant to cover the banking business * * *."

Congressman Gwynne went on to say that if insurance was to be included, a specific law should be enacted which would cover insurance "more equitably and more accurately" than the Robinson-Patman Act.

ARGUMENT

Analysis of Court of Appeals Decision

An erroneous statement appears in the Petition (p. 7) to the effect that Travelers' advertising goes directly by mail from the Company to the *public*. In the Findings of Fact of the Federal Trade Commission itself (App. 43), it is specifically found -

"The respondent does no newspaper or magazine advertising, but solicits sales by mailing * * * circular letters to 'white-collar' workers. * * * There are other letters for lapsed policyholders urging them to reinstate * * * letters are not broadcast to the public, but are addressed to individuals who have been recommended by respondent's policyholders."

The Hearing Examiner (App. 20) made similar findings of fact.

There is an additional error in the Petition (p. 7) where it is stated respondent is licensed in only one state (Virginia); presumably the intention was to say "one *other* state" than Nebraska.

The Petition (p. 7) makes an erroneous inference in saying that the Court of Appeals concluded that the insurance laws of Nebraska, "*particularly* as amended in 1957" prohibit Nebraska domiciled companies from engaging in unfair or deceptive acts or practices, etc. The Court of Appeals did not *rely* upon the 1957 amendment, but after referring to it in a favorable light, held:

"Moreover, we think the Director of Insurance of Nebraska *at all time* here involved had the power to regulate the practices of the petitioner in the solicitation of insurance in Nebraska and other states." (Emphasis supplied).

No doubt the Court of Appeals had in mind Nebraska regulatory statutes, *supra* under "Statutes Involved", some of which were enacted in 1913, many years before the decision in *United States v. South-Eastern Underwriters Association*, 322 U. S. 533, and the enactment of the McCarran-Ferguson Act.

The Court of Appeals previously said:

"Since its incorporation in 1904, the petitioner has been supervised, regulated and periodically examined by the Insurance Department of the State of Nebraska. That the laws of that State are adequate to enable the Nebraska Insurance Department to deal effectively with any unfair advertising practice of the petitioner or of any other insurer domiciled in that State cannot be questioned."

The Federal Trade Commission itself conceded in its supplemental brief on reargument in the Court of Appeals that the domiciliary state -

> "may resort to whatever measures are authorized under its own laws to compel compliance with the local statute even with respect to advertising material disseminated by that company *outside* the domiciliary state. The domiciliary state can go as far as to revoke the charter of a company and thus put it out of business." (Emphasis supplied).

The Court of Appeals, in emphasizing that every activity of Travelers is performed in the State of Nebraska, and its advertising letters distributed by mail only after all of Travelers' acts were completed, said:

> "It must be kept in mind that the business of the petitioner was all done at or from its home office in Omaha. There its solicitation material originated and was mailed; there the applications for insurance induced by solicitation were received; there all policy contracts were written; and there all premiums were paid."

The court then added:

> "With every activity of the petitioner, in the conduct of its business, subject to the supervision and control of the Director of Insurance of Nebraska, we think that the petitioner's practices in the solicitation of insurance by mail in Nebraska or elsewhere reason-

ably and realistically cannot be held to be unregulated by State law."

The domiciliary state is interested in the integrity and good reputation abroad of its home industry. See *Sligh v. Kirkwood*, 237 U. S. 52.

The True Perspective of the Senate Debate

The tenor of the debates in the House prior to the Conference Committee and in the Senate based upon the Conference Committee report, was directed almost entirely to the effect of the moratorium on the Sherman Act and the Clayton Act, and whether after the termination of the moratorium period the Sherman and Clayton Acts in their entirety should be restricted in their application in the event this field was then occupied by state law, or whether it was sufficient for Congress to exclusively reserve the boycott, coercion and intimidation provisions (Section 3(b)) of these acts from dilution by state law. It was these features that were before the Senate when Senators O'Mahoney and Ferguson, who together with Senator McCarran, represented the Senate on the Conference Committee, made the statements attributed to them by petitioner (p. 9). Both statements were in reply to questions pertaining to rating organizations raised by Senator Pepper. The undue emphasis given these quotations by petitioner should be considered only in their full context:

"MR. PEPPER. Mr. President, if we do not expect the states in their regulation to encroach upon the Sherman Act and the Clayton Act, why give them authority to do so? If we believe in the Sherman Act and the Clayton Act, why should we delegate to state legislatures the right to cloud them and curtail their effectiveness should they wish to do so?

MR. O'MAHONEY. I should like to answer the Sena-

tor's question specifically: First, however, the matter is not a theoretical one. It is an extraordinary practical matter. I am viewing it from the point of view of a person who has lived with the problem of state and federal regulation almost from the moment the original bill to exempt insurance from all aspects of the anti-trust laws was introduced. Mr. President, there are three forms of regulation. There is state regulation concerning which the Senator from Maryland has spoken so clearly. There is federal regulation as a legal possibility but no one is urging it now. The third, and this has been harmful to the public interest, is regulation by private combinations and groups; a type of regulation which has been enforced by private combinations and groups through private rules and regulations under which persons engaged in the insurance industry could be tried and convicted for the violation of private law. That type of regulation would be absolutely outlawed should the conference report be adopted.

MR. PEPPER. Not if the state legislatures decided otherwise.

MR. O'MAHONEY. Mr. President, there is not a line or sentence in the proposed act, as I have read it, which would delegate to any state the power to legislate in the field of interstate and foreign commerce. State regulation must be for the state and not for the United States. The bill does not supervise the power of Congress to regulate in the field of interstate commerce, but, wisely, it seems to me, undertakes to say in effect to the state 'for this period to take the responsibility and regulate insurance in the interest of the public.'

MR. PEPPER. Not for this period; but indefinitely.

MR. O'MAHONEY. For this period so far as the antitrust laws are concerned it would be a moratorium.

MR. PEPPER. Oh, we are not talking about a moratorium; we are talking about the period beyond the

moratorium.

MR. O'MAHONEY. * * * *
Within its own boundaries, the state may authorize agreements for rate-making just as the Congress of the United States by passing the interstate commerce act, authorizing rate-making by combinations in the railroad field and just as practically every state in the union has authorized public utilities rate-making within the state. But what I wish to say to the Senator from Florida, and to other Senators as well, without any reservation is this: When the moratorium period passes, the Sherman Act, the Clayton Act and the Federal Trade Commission Act come to life again in the field of interstate commerce, and in the field of interstate regulation. Nothing in the proposed law would authorize the state to try to regulate for other states, or authorize any private group or association to regulate in the field of interstate commerce.

MR. PEPPER. Mr. President, I should like to clarify in my mind the Senator's distinction. The able Senator from Michigan said a moment ago, in response to my invitation, that if the insurance companies doing business in the Southeastern States were to fix their rates through a rating bureau centered in Atlanta, and if they applied in the State of Florida for the rates which had been fixed, but did so by authority of the State Legislature of Florida, it would be consistent with this proposed act, and would be lawful. Am I correct in my statement?

MR. FERGUSON. If the Senator's statement was that the proposed act would permit a State to regulate interstate commerce—insurance is interstate commerce—in the various States, the State could not do it.

MR. PEPPER. No one is claiming that * * *.

MR. FERGUSON. I think that under this bill they could allow a rate-making bureau to sit anywhere to fix the rates for Florida." (91 Cong. Rec. 1483-1484)

The true purport of the McCarran-Ferguson Act was indicated at the close of the Senate debate, on adoption of the conference report, when Senators Ferguson and O'Mahoney summarized the intention and purpose of the McCarran-Ferguson Act as follows:

"MR. FERGUSON. I think it should be added in reply to the Senator from Kentucky (Mr. Barkley) that there is no attempt here to have Congress throttled in the future in acting upon insurance legislation. Subsection (6) of section 2 provides that if Congress does act, the act should specifically relate to the business of insurance.

MR. O'MAHONEY. That is correct.

MR. FERGUSON. What we have in mind is that the insurance business, being interstate commerce, if we merely enact a law relating to interstate commerce, or if there is a law now on the statute books relating in some way to interstate commerce, it should not apply to insurance. We wanted to be sure that the Congress, in its wisdom, would act specifically with reference to insurance in enacting the law.

MR. O'MAHONEY. In other words, no existing law and no future law should, by mere implication, be applied to the business of insurance.

MR. FERGUSON. That is correct.

MR. O'MAHONEY. That was the understanding.

MR. FERGUSON. In other words, we would not repeal this law by implication.

MR. O'MAHONEY. The Senator is quite correct. Mr. President, it is for those reasons that I feel that this legislation, as embodied in the conference report, is decidedly in the public interest, and should be enacted.

THE PRESIDING OFFICER. The question is on agreeing to the conference report." (91 Cong. Rec. 1487)

The Intent of the McCarran-Ferguson Act

Congress intended the McCarran-Ferguson Act to reinstate the *status quo* as it existed prior to *United States v. Southeastern Underwriters Association*, 322 U. S. 533. Prior to that decision, the Federal Trade Commission never questioned the exclusive jurisdiction of the states to regulate *all* insurance—no exceptions whatever.

This court, in *Prudential Insurance Co. v. Benjamin* (1946), 328 U. S. 408, stated the purpose of Congress was to support *existing state* regulatory systems. Regulation of direct mail companies by the states was "existing" at time of enactment of McCarran Act. This court also held, in *Prudential*, that "future" state regulatory systems would be supported under the McCarran-Ferguson Act. The various Nebraska statutes, *supra*, enacted in 1947, and including the 1957 amendment, were all "future" as related to the 1946 decision in *Prudential*.

The decision in *Prudential* held that "obstructions" flowing from Congress' own power, such as its power to regulate interstate commerce were removed; also that "continued state regulation" of (all) insurance business was declared to be in the public interest—no exception made of direct mail business; further, that Congress "must have had full knowledge of the nation-wide existence of state systems of regulation." The existence of direct mail insurance was then known to Congress.[1]

The decision in *Prudential* held that state regulation was known to "differ greatly in scope and character." Nebras-

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1 In 1935 there was introduced in Congress the Hobbs Bill (H.R. 6452) which would have made it unlawful to use the United States mails for soliciting or effecting in-

ka's enactment of the 1957 amendment to the Fair Trade Practices Act is an addition to usual statutory techniques. Congress threw the "whole weight of its power behind the state systems, notwithstanding these variations."

This court in *Prudential* further held the implications of the commerce clause were considered by Congress because the opinion of the court referred to the fact that the states were "grappling with nation-wide, but nationally unregulated, business", and the states "exerted their powers to limits and in ways not sought generally to be applied to other business held to be within the reach of the Commerce's clauses implied prohibition." It will be recalled this case involved premium taxation by the state.

In *Wilburn Boat Co. v: Fireman's Fund Insurance Co.*, 348 U. S. 310, this court said the McCarran-Ferguson Act was designed "to *assure* that *existing state power* designed

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surance, transmitting policies or collecting premiums, without first complying with the insurance laws of the state (that is being licensed) where the property insured or the subject matter of the insurance is located.

The bill was reintroduced in 1941 and again in 1943 (H.R.687), Congressional hearings were held, but the bill was never enacted. The necessity of Congressional action to require the licensing of a company in a state in which it conducted business through use of the mails was discarded. Subsequent decided cases under the Service of Process Acts and *Travelers Health Association v. Virginia*, 339 U. S. 643, indicate that such power and authority of the states already existed, and at any time they can require the licensing of companies doing such business in states other than that of domicile. Congress had no intention of attempting intrusion into the states' insurance regulatory power, preempted by the states ever since *Paul v. Virginia*, 8 Wall (75 U. S. 168.

to regulate insurance would *continue*" because the control of "*all* types of insurance companies and contracts" *has been and should be* primarily a state function. (Emphasis supplied). This case involved marine insurance.

In *McGee v. International Life Insurance Co.*, 355 U. S. 220, this court held that a trend is clearly discernible toward expanding "the permissible scope of state jurisdiction over foreign corporations * * * attributable to the fundamental transformation of our national economy over the years * * * a great increase in the amount of business conducted by mail across state lines * * *." The court said there was *no denial of due process*, citing *Travelers Health v. Virginia*, 339 U. S. 643. Also see *Robertson v. California*, 328 U. S. 440.

Although the Court of Appeals, in the case at bar, did not touch upon it, this court in *Travelers Health Association v. Virginia*, supra, is authority for the proposition that the State of Virginia could regulate Travelers, a Nebraska domiciled company, and could and did issue a cease and desist order against it. Any state could do the same. Consequently, not only does Nebraska have the power to regulate, under the terms of the McCarran-Ferguson Act, but any other state can do so under the authority of *Travelers v. Virginia*, supra.

At no time since the enactment of the McCarran-Ferguson Act has this court rendered a decision permitting in any manner a federal agency to enter the field of insurance regulation or allowing the claim to be made that state laws should not be applicable to insurance because of its interstate character.

These principles have been reiterated in the recent

case of *Federal Trade Commission v. National Casualty Company*, 357 U. S. 560, wherein the court stated:

> "An examination of that statute (McCarran Act) and its legislative history establishes that the Act *withdrew* from the Federal Trade Commission the authority to regulate respondents' advertising practices in those States which are regulating those practices under their own laws." (Emphasis supplied).

Then in the very resent decision where variable annuities were being considered, the majority opinion in arriving at its decision again emphasized the accepted position of state regulation of insurance by saying:

> "We start with a reluctance to disturb the state regulatory schemes that are in actual effect, either by displacing them or by superimposing federal requirements on transactions that are tailored to meet state requirements. When the States speak in the field of 'insurance', they speak with the authority of a long tradition. For the regulation of 'insurance' though within the ambit of federal powers (United States v. South-Eastern Underwriters Asso., 322 U. S. 533; 88 L. ed. 1440, 64 S. Ct. 1162) has traditionally been under the control of the States."
>
> *Securities & Exchange Co. v. Variable Annuity Life Ins. Co.*, —— U. S. ——, 3 L. ed. 2d 640, 643.

Thereby the court has given full judicial recognition of the expressed intention of Congress and particularly those words of Senators O'Mahoney and Ferguson that "no existing law and no future law should, by mere implication, be applied to the business of insurance" and "if there is a law now on the statute books relating in some way to interstate commerce, it would not apply to insurance." (Supra p. 10-13).

No Valid Reason Exists for Granting Writ of Certiorari

Petitioner (p. 11) says the question here involved is of substantial importance in the administration of the Federal Trade Commission Act; adding that more than half of the 41 insurance companies originally complained against by the Commission solicit business exclusively by mail in one or more states in which they are not licensed and employ no agents; that the volume of such business is extensive and is increasing. Again, petitioner makes erroneous statements and draws inaccurate inferences. The facts are:

Of the 41 complaints, after the Commission's defeat in the *National Casualty* case, all have been dismissed by the Commission (a mere handful having agreed to consent orders prior to the court's decision in *Federal Trade Commission v. National Casualty Company*, 357 U. S. 560), except 7, and of latter, 2 companies conceded Federal Trade Commission jurisdiction for the purposes peculiar to the record therein. Among the dismissals, were involved companies doing an enormous volume of advertising in newspapers and magazines, and through radio and television, which advertising *really reached the public*. Yet, in the case at bar, in which the advertising letters reach the eyes of only a selected list of persons and the public at large never seeing same, the Commission represents to this court that a question of substantial importance is involved.

CONCLUSION

The McCarran-Ferguson Act, as interpreted by the decisions of this court, in the light of the volume and comprehensiveness of Nebraska legislative regulatory authority, establishes the exclusive jurisdiction of Nebraska to

regulate its domiciled companies *in toto;* that dual regulation or concurrent regulation may not be shared between the states and the Federal Trade Commission. For the reasons stated, the Petition for Certiorari should be denied.

Respectfully submitted,

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INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 51

FEDERAL TRADE COMMISSION, PETITIONER

v.

TRAVELERS HEALTH ASSOCIATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (R. 134–140) is reported at 262 F. 2d 241. The opinion of the Federal Trade Commission (R. 49–53) and the concurring opinion of Commissioner Gwynne (R. 54–61) are reported at 53 F.T.C. 548.

JURISDICTION

The judgment of the court of appeals was entered on January 13, 1959 (R. 141). The petition for a writ of certiorari was filed on April 13, 1959, and was granted on May 18, 1959 (R. 141; 359 U.S. 988). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the McCarran Act deprives the Federal Trade Commission of jurisdiction to prohibit unfair and deceptive practices by an insurance company doing an interstate business solely by mail, where the state in which it is incorporated and maintains its home office prohibits unfair or deceptive practices in the insurance business there or "in any other state."

STATUTES INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 66 Stat. 632, 15 U.S.C. 45, provides in part:

> (a)(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> * * * * *
>
> (6) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

The Act of March 9, 1945, 59 Stat. 33, as amended, 61 Stat. 448, 15 U.S.C. 1011–1015 (referred to herein as the McCarran Act), provides in part: [1]

> [Sec. 1.] That the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

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[1] The amendment substituted the words "June 30, 1948" for the words "January 1, 1948" in § 2(b) and § 3(a).

Sec. 2. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

Sec. 3. (a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, and the Act of June 19, 1936, known as the Robinson-Patman Antidiscrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

Section 44-1503 of Reissue Revised Statutes of Nebraska, 1943, as amended by the emergency Act of

May 14, 1957 (Laws of Nebraska 1957, c. 191, § 2) provides:

> No person shall engage in this state in unfair methods of competition or in unfair or deceptive acts and practices in the conduct of the business of insurance. No person domiciled in or resident of this state shall engage in unfair methods of competition or in unfair or deceptive acts and practices in the conduct of the business of insurance in any other state, territory, possession, province, country, or district.[2]

STATEMENT

A complaint issued by the Federal Trade Commission in October 1954 charged that respondent, a Nebraska corporation engaged in selling policies insuring against losses occasioned by sickness, had induced sale of its policies by certain false and deceptive statements, in violation of § 5 of the Federal Trade Commission Act (R. 5-9). After an initial decision by the hearing examiner following the taking of evidence (R. 17-40), the Commission, on cross appeals to it, entered its own findings of fact, conclusions, and a cease and desist order (R. 40-48).[3] The Commission also filed an opinion explaining the grounds for its findings on misrepresentation and for its conclusion

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[2] The second sentence was added by the 1957 "emergency" Act.

[3] The representations which the Commission found to be deceptive, and against which its order is directed, involved concealment or insufficient disclosure of (1) the insurer's right to terminate the policy, (2) limitations on the duration of the benefits or indemnification provided, and (3) the materiality of the insured's good health as of the time of the policy issuance (R. 42-47).

that it had jurisdiction of the proceedings (R. 49–53). A separate opinion of Chairman Gwynne stated his reasons for concurring in the jurisdictional ruling (R. 54–61).

The Commission's findings as to the nature and character of respondent's business (R. 41–42) are not disputed. Respondent makes insurance contracts with residents of every state but is licensed to do business only in Nebraska and Virginia. It sells no policies through agents and does no newspaper or magazine advertising. It solicits sales by mailing a series of circular letters to "white-collar" workers, persons recommended to respondent by its policyholders. An individual prospect ordinarily receives a series of eight letters, although some receive as many as 30. An application blank containing advertising material on the reverse side is enclosed in each mailing. An additional leaflet, slip or statement may be enclosed, such as a leaflet entitled "Our Plan Explained" or a slip (with a testimonial printed on the back side) showing the period of coverage if a membership deposit is made.

All of respondent's promotional activities originate in its home office in Omaha, Nebraska, and its advertising is mailed from Omaha. That is where its policies are issued and premium payments are received. Claims made under its issued policies are filed, serviced, and paid at or from that office. Respondent pays taxes to Virginia on premiums collected from Virginia residents and pays taxes to Nebraska on the premiums collected from all other policyholders. For

the years 1952, 1953, and 1954, its premium collections averaged more than $550,000.

The Commission majority concluded that the instant proceeding was within the Commission's jurisdiction, for "reasons stated" in its opinion in its proceeding against American Hospital and Life Insurance Company (R. 52).[4] Commissioner Gwynne, who had dissented on the jurisdictional issue in the *American Hospital* case and who had participated as a member of Congress in the debates leading to passage of the McCarran Act (91 Cong. Rec. 1089–1090), pointed out in his concurring opinion in the instant case that, unlike the *American Hospital* situation, the present respondent was making representations to induce sale of insurance in states in which it was not licensed and had no agents (R. 54–55), and accordingly was not regulated by the laws of these states. He expressed the view that when the McCarran Act made the Federal Trade Commission Act applicable to the business of insurance "to the extent that such business is not regulated by State law", the Act referred to the regulatory "laws of the state whose citizens are being affected by the advertising and not to laws of some other state operating extraterritorially" (R. 60). He therefore concluded that, insofar as Nebraska law applied to representations made to non-residents of Nebraska, respondent was not, as to these representations, "regu-

[4] The Commission's jurisdictional ruling, on the facts there involved, was held erroneous in *FTC* v. *National Casualty Co.*, 357 U.S. 560, a decision which passed upon both the order entered against National Casualty Co. and the order entered against American Hospital & Life Insurance Co.

lated by State law" within the meaning of the McCarran Act.

Respondent's petition to review the Commission's order was argued in the court below on November 13, 1957, but that court deferred decision pending this Court's disposition of the two cases on which it ruled in *FTC v. National Casualty Co.*, 357 U.S. 560 (R. 136).[5] Following this Court's decision and a reargument below of the question of the Commission's jurisdiction in the instant case, the court of appeals held that respondent's practices were beyond the regulatory power of the Commission. It stated that since the law of Nebraska, at least as amended in 1957, subjected every activity of respondent to the supervision and control of the Director of Insurance of Nebraska, respondent's practices in soliciting insurance by mail in Nebraska or elsewhere "reasonably and realistically cannot be held to be unregulated by State law", and "are regulated by State law within the letter and spirit of the McCarran-Ferguson Act" (R. 139-140).

Judge Vogel, dissenting, stated that it was "impractical and ineffective" to "force the citizens of other states to rely upon Nebraska's regulation" of respondent's mail order business and that Nebraska's regulation of deceptive practices in promoting the sale by mail of insurance in other states is not "the kind of regulation by state law Congress had in mind" when it passed the McCarran Act (R. 140). He was further of the view that respondent's business

[5] Writ of certiorari was granted in these cases on November 12, 1957. 355 U.S. 867.

ness "is not regulated and cannot be regulated" by the laws of the states in which its advertising is disseminated (*ibid.*). He concluded that, since there was no state regulation which the McCarran Act makes a barrier to Commission action, the order which it entered "falls squarely" within its authority and jurisdiction as defined in that Act (*ibid.*).

SUMMARY OF ARGUMENT

This case does not concern the basic provisions and objective of the McCarran Act—to authorize continued state taxation and regulation of the insurance business free from limitations inhering in the commerce power of Congress. The case concerns solely the meaning and application of the § 2(b) proviso, which declares that the Federal Trade Commission Act shall be applicable to the insurance business (after a specified moratorium) to the extent that such business is not "regulated by State law". The case is not controlled by the holding in *FTC* v. *National Casualty Co.*, 357 U.S. 560, that there is state regulation which ousts the Federal Trade Commission from jurisdiction if the states in which a company is doing business have enacted legislation proscribing unfair insurance advertising and have ample means to regulate this advertising "within their respective boundaries." In *National Casualty* the question of Congressional intent respecting "interstate insurance practices which the states cannot for constitutional reasons regulate effectively" was reserved.

A. The legislative history of the McCarran Act establishes (1) that Congress intended to secure "ade-

quate control and regulation of the business of insurance, (2) that Congress acted in due recognition of constitutional due process limitations on the power of a state to regulate extraterritorial conduct, and (3) that conduct not subject to effective state regulatory control would, after a short moratorium, come under the Federal Trade Commission Act and the other federal statutes covered by the § 2(b) proviso. As to conduct covered by these statutes, therefore, Congressional approval of continued state regulation was not intended to permit any regulatory vacuum.

B. (1) We submit that the phrase "regulated by State law", as used in the McCarran Act, means regulation by the law of the state where the offending action occurs and is actually or potentially injurious. The construction of the Act by the court below means that if a Nebraska-domiciled insurer bombards the residents of every other state with mail-delivered misrepresentations, the McCarran Act withdraws from the residents of all other states the protection afforded by the Federal Trade Commission Act provided Nebraska officials have statutory authority to take prophylactic action. This Court has referred to the "unwisdom, unfairness and injustice" of permitting redress by policyholders against an insurer "only in some distant state where the insurer is incorporated". *Travelers Health Assn.* v. *Virginia,* 339 U.S. 643. It is equally unwise, unfair and unjust if the residents of Maine, Florida, Texas, California, *etc.*, have no protection under state law against unwarranted or exaggerated claims likely to entrap the gullible and unwary other than that which may be afforded by

action of state officials in "some distant state where the insurer is incorporated".

Our view that the McCarran Act does not in these circumstances divest the Federal Trade Commission from jurisdiction does not enlarge the domain of federal law at the expense of state regulation. Each state retains full power to regulate the insurance business conducted within its own borders, and a state may even attempt to project its own law into other states. Our contention is simply that the state regulation intended to displace existing federal legislation outlawing deceptive practices in interstate commerce channels is regulation by the state where the deception is practiced and has its impact. Furthermore, the Federal Trade Commission has consistently construed the McCarran Act as not withdrawing from the Commission jurisdiction over the mail order insurance business, and at least a substantial part of the industry (mail order insurers) has accepted or supported this interpretation of the Act.

(2) A Nebraska law makes it unlawful for a Nebraska-domiciled insurance company to engage in deceptive practices "in any other state." By its express terms, the law is a regulation of extraterritorial conduct. Due process limitations on the power of a state to regulate extraterritorial acts, as established by decisions of this Court, cast serious doubt on the constitutional validity of the Nebraska law as applied to respondent's out-of-state, mail-delivered misrepresentations. If the McCarran Act means that the Nebraska law deprives the Federal Trade Commission of jurisdiction in the instant case, the con-

stitutional validity of the Nebraska statute as applied to out-of-state conduct must be determined. We submit that this construction of the Act should be rejected, under the accepted principle that a statute is to be construed, if reasonably possible, so as to avoid determination of a substantial constitutional question.

C. The laws of the various states in which respondent solicits sale of insurance do not regulate the representations mailed to its residents by a nonresident, nonlicensed company soliciting sale of insurance solely through the mails. Such non-regulation is shown not only by the provisions of the "Model Unfair Trade Practices Act" for insurance companies which the various states have adopted, but also by the fact that respondent itself has not at any time claimed during the protracted course of this proceeding that its representations are regulated by any state other than Nebraska. In the court below, 20 states in effect disclaimed that their laws regulate such representations. Of course, mere existence of constitutional *power* to regulate, absent actual regulation, is not regulation by state law within the meaning of the McCarran Act proviso.

But there would not be such regulation even if a state regulatory law were deemed to apply to misrepresentations mailed to its residents by a nonresident insurance company because the law could not be effectively enforced against such a company. Even if we assume that, upon the basis of service by registered mail, a valid administrative order or court injunction, or even a judgment for a statutory penalty, could be obtained (cf. *Travelers Health Assn.* v. *Virginia,*

supra), the order or judgment would be a mere paper command, enforcible—since respondent has no property outside of Nebraska—only by a proceeding thereon in the courts of Nebraska. But, for many reasons, a Nebraska court proceeding would not be a practical or effective means of enforcement. For one thing, the limited resources of money and manpower of state insurance departments would hardly be committed to prosecution of a suit in another state. For another thing, the outcome of such a suit would be highly uncertain and doubtful—Nebraska would undoubtedly apply the rule that the full faith and credit clause of the Constitution does not require a state to enforce a pecuniary penalty for violation of the statutes of another state. In short, regulation subject to such contingencies and hazards would not meet the McCarran test of conduct "regulated by State law".

ARGUMENT

RESPONDENT'S REPRESENTATIONS CONCERNING ITS INSURANCE POLICIES, MAILED TO RESIDENTS OF STATES IN WHICH IT IS NOT LICENSED TO DO BUSINESS AND HAS NO AGENT, ARE NOT "REGULATED BY STATE LAW" WITHIN THE MEANING OF THE PROVISO TO SECTION 2(b) OF THE MCCARRAN ACT, AND HENCE ARE WITHIN THE FEDERAL TRADE COMMISSION'S REGULATORY AUTHORITY

The circumstances leading to enactment of the McCarran Act and the primary purpose of the statute are clear and well known. Decisions of this Court dating from 1869 had held that the business of insurance is not "commerce", and that state laws regulating or taxing this business were free from limita-

tions imposed by or inherent in the commerce power of Congress. The decision in 1944 in *United States* v. *South-Eastern Underwriters Association*, 322 U.S. 533, that this business, when conducted across state lines, is within the federal commerce power was believed to cast doubt on the validity of much existing state legislation. The primary purpose of the McCarran Act was to remove these doubts by putting the "full weight" of the power of Congress, to the extent that it constitutionally could do so, "behind existing and future state legislation to sustain it from any attack under the commerce clause". *Prudential Insurance Co.* v. *Benjamin*, 328 U.S. 408, 431. See also *Maryland Casualty Co.* v. *Cushing*, 347 U.S. 409, 413.

To accomplish this end, Congress declared that continued state regulation and taxation of the business of insurance is "in the public interest" and "shall be subject to" the laws of the several states in this respect, and that no act of Congress, unless it "specifically relates to the business of insurance", shall be construed to "invalidate, impair, or supersede" any state law regulating or taxing this business (§§ 1, 2 (a), (b), *supra*, pp. 2–3).

These general provisions do not govern application of the Federal Trade Commission Act to the insurance business since the McCarran Act specifically provides that, after June 30, 1948, this Act (as well as the Sherman and Clayton Acts) "shall be applicable to" the insurance business "to the extent that such business is not regulated by State law" (§ 2(b) proviso, *supra*, p. 3). The question here, as in *FTC* v. *National Casualty Co.*, 357 U.S. 560, concerns solely

the meaning and application of the § 2(b) proviso.

National Casualty held that the McCarran Act "withdrew from the Federal Trade Commission the authority to regulate [respondents'] advertising practices in those States which are regulating those practices under their own laws". 357 U.S. at 563. The Court found that, as to the advertising practices of the insurance companies there involved, "the States possess ample means to regulate this advertising within their respective boundaries".[6] *Id.* at 564. It was therefore unnecessary for the Court to pass upon the Commission's contention that "because Congress understood that in accordance with due process there are territorial limitations on the power of the States to regulate an interstate business, it did not intend to foreclose federal regulation of interstate insurance as a supplement to state action" (*id.* at 563), and the Court reserved the question of "the intent of Congress with regard to interstate insurance practices which the States cannot for constitutional reasons regulate effectively" (*id.* at 564).

In the instant case, the court below held that respondent was "regulated by State law" within the contemplation of the § 2(b) proviso, by virtue of a Nebraska statute which declares it to be unlawful for a Nebraska-domiciled insurance company to engage in deceptive practices "in any other state". The court made no reference to the legislative history of

[6] There was this ample power because the companies solicited insurance through independent agents, who distributed locally the advertising material which the companies shipped to them, and the companies themselves were licensed in the states in which they solicited business. *Id.* at 562.

the McCarran Act, which we think should be examined for such light as it may throw on the legal issues in this case.

A. PERTINENT LEGISLATIVE HISTORY OF THE MCCARRAN ACT

There is no doubt that Congress, in authorizing state regulation of the insurance business, (1) intended that this business be subject to effective regulation, (2) recognized that there are due process constitutional limitations on a state's power to regulate extraterritorial conduct, and (3) maintained the Sherman, Clayton, and Federal Trade Commission Acts in full force and effect in their application to any conduct not subjected to regulation by a state having power and jurisdiction to regulate. In short, the approval which Congress gave to state regulation was not intended to permit, with respect to the subject matter covered by the foregoing statutes, any regulatory vacuum or no man's land.

As to (1) above, both the Senate and House reports on the bill which became the McCarran Act stated that it was the purpose of Congress "to secure *adequate* regulation and control of the insurance business" (emphasis added). S. Rep. 20, 79th Cong., 1st Sess., p. 2; H. Rep. 143, 79th Cong., 1st Sess., p. 2.

As to (2) above, the House report on the bill stated (H. Rep. 143, 79th Cong., 1st Sess., p. 3):

> It is not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the *South-*

> *eastern Underwriters Association case.* Briefly, your committee is of the opinion that we should provide for the continued regulation and taxation of insurance by the States, subject always, however, to the limitations set out in the controlling decisions of the United States Supreme Court,[7] * * * which hold, inter alia, that a State does not have power to tax contracts of insurance or reinsurance *entered into outside its jurisdiction* by individuals or corporations resident or domiciled therein covering risks within the State or to *regulate such transactions in any way.* [Emphasis added.]

Furthermore, when Senator McCarran presented to the Senate the bill agreed to in conference, he initially read most of the foregoing quotation as part of his explanation of the bill. 91 Cong. Rec. 1442.

As a preliminary to discussion of (3) above, we briefly outline the legislative steps leading to adoption of the § 2(b) proviso. The bill passed by the Senate is in substance the same as the final enactment, with these exceptions: § 2(b) contained no proviso, and the Sherman and Clayton Acts were expressly excluded from the declaration that no act of Congress shall "invalidate", etc., any state law regulating or taxing the business of insurance. The moratorium, as provided in § 3(a) of the Act, covered only the Sherman and Clayton Acts, and § 3 of the bill provided that the Federal Trade Commission and Robinson-Patman Acts shall not apply to the business of insurance. 91 Cong. Rec. 488.

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[7] Citing *Allgeyer v. Louisiana*, 165 U.S. 578; *St. Louis Cotton Compress Co. v. Arkansas*, 260 U.S. 346; *Connecticut General Insurance Co. v. Johnson*, 303 U.S. 77.

The House Judiciary Committee reported the Senate bill with an amendment substituting the provisions of a House bill (H.R. 1973), but the only change here pertinent which was made was to eliminate exception of the Sherman and Clayton Acts from the provisions of § 2(b),[8] an elimination which had the effect of barring application of these statutes to the insurance business, after the moratorium period, if the application would "invalidate, impair, or supersede" any state regulatory law.[9] The House passed the bill as thus reported (91 Cong. Rec. 1093–4), but in the preceding debate certain members questioned or objected to § 3, which provided that the Federal Trade Commission and Robinson-Patman Acts shall not apply to the insurance business,[10] and Representative Sumners, Chairman of the House Judiciary Committee, stated that in conference he would support eliminating this indefinite suspension of these statutes and bringing them under the moratorium provided as to the Sherman and Clayton Acts. 91 Cong. Rec. 1093. The conferees adopted the change with respect to the Federal Trade Commission and Robinson-Patman Acts advocated in the House debate. In addition, they adopted the House version of § 2(b), which did

[8] H. Rep. 143, 79th Cong., 1st Sess., pp. 1–2; 91 Cong. Rec. 1086, 1093–4.

[9] This barrier did not cover application of the Sherman Act to acts or agreements involving boycott, coercion or intimidation, as to which the Sherman Act was made applicable both during and following the moratorium period. § 3(b) of the Act; § 4(b) of both Senate bill and bill as amended by House Judiciary Committee.

[10] Representatives Cochran (91 Cong. Rec. 1086); Gwynne (*id.*, 1090), Kefauver (*id.*, 1092), Patman (*id.* 1093).

not except therefrom the Sherman and Clayton Acts, but added a proviso that, following the moratorium period, these statutes and the Federal Trade Commission Act "shall be applicable to" the insurance business "to the extent that such business is not regulated by State law". H. Conf. Rep. 213, 79th Cong., 1st Sess.

The House accepted the conference report without debate. In the Senate, discussion centered almost exclusively on what would be the effect of the § 2(b) proviso on application of the Sherman Act to the insurance business. 91 Cong. Rec. 1443–4, 1477–88. Each of the three Senate conferees (McCarran, O'Mahoney, Ferguson) replied at various times to questions or objections (principally by Senator Pepper) on this aspect of the bill. The conferees made it clear that in their opinion the statutes covered by the proviso would not apply to conduct within the scope of a state regulatory law which sanctioned or otherwise regulated conduct which these federal statutes proscribe, but they also pointed out limits on state legislation which would have this superseding effect.

Senator McCarran stated (91 Cong. Rec. 1444) that it was his interpretation that—

> where States attempt to occupy the field—but do it inadequately—by going through the form of legislation so as to deprive the Clayton Act, the Sherman Act, and the other acts of their jurisdiction, * * * where the legislation fails adequately even to deal with the field it attempts to cover, these acts still would apply.

Senator Ferguson said (*id.* 1481):

> The Senator from Florida was talking about an agreement which related to many States. This bill would not permit such an agreement, because no State law could allow a monopoly to exist outside the State.

This statement, coupled with Senator Ferguson's further statement that the bill would permit Florida to pass a law authorizing insurance companies "to fix the rates for Florida" through the instrumentality of a rating bureau sitting outside that state (*id.* 1484), shows that, with respect to the superseding effect of state legislation, he drew a sharp distinction between a state law purporting to regulate extraterritorial conduct and a state law regulating conduct of the insurance business within the enacting state.

Senator O'Mahoney drew the same distinction. He said (*id.* 1483):

> Within its own boundaries the State may authorize agreements for rate making * * *. * * * Nothing in the proposed law would authorize a State to try to regulate for other States * * *.

B. RESPONDENT'S REPRESENTATIONS MAILED TO NON-RESIDENTS OF NEBRASKA ARE NOT "REGULATED", WITHIN THE MEANING OF THE MCCARRAN ACT PROVISO, BY THE NEBRASKA STATUTE MAKING IT UNLAWFUL FOR A NEBRASKA-DOMICILED INSURANCE COMPANY TO ENGAGE IN DECEPTIVE PRACTICES "IN ANY OTHER STATE"

When the Commission issued its order and when the present review proceeding was started, a law of Nebraska applying to the insurance business provided that no person "shall engage in this state * * * in unfair or deceptive acts and practices" (*supra*, p. 4).

Subsequently, this provision was amended by adding the following prohibition (*ibid.*):

> No person domiciled in or resident of this state shall engage in unfair methods of competition or in unfair or deceptive acts and practices in the conduct of the business of insurance in any other state, territory, possession, province, country, or district.[11]

For the purposes of this case, we are willing to assume that the validity of the Commission's order is to be tested by the law of Nebraska, not as of the time the order was issued, but as of the time its validity is judicially reviewed.

(1) We pass for the moment the serious constitutional question raised by the purported projection of Nebraska law beyond its boundaries (see *infra*, pp. 25–28). For, in any event, we submit that when Congress provided in the McCarran Act that certain federal statutes are displaced to the extent that the insurance business is "regulated" by state law, it contemplated only regulation by the law of the state where the offending action occurs and has operative force and effect. The interpretation adopted by the court below means that if residents of Maine, Florida, Texas, California, etc., are bombarded by misleading representations sent through the mails, the protective Federal Trade Commission Act is displaced by reason

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[11] The amendatory act made a corresponding change in §§ 44–1501, 44–1506, and 44–1515, Reissue Revised Statutes Nebraska, 1943, and its title stated that it was an act "to clarify the authority of the Director of Insurance to regulate methods of competition and trade practices *in other jurisdictions*" (emphasis added) of insurance companies domiciled or resident in Nebraska. Laws of Nebraska, 1957, c. 191.

of the existence of a Nebraska regulatory law. We urge that it is contrary to the purpose of the McCarran Act to construe it as displacing the remedy given by the Federal Trade Commission Act when the beneficiaries of the protective federal legislation are without remedy under the law of the state where they live, work, and receive misrepresentations, even if officials of some other state may be clothed with power (should they choose to exercise it on behalf of non-residents, to the detriment of the domiciliary corporation) to take prophylactic action.

The Committee reports on the bill unequivocally state that the purpose of Congress was to secure "adequate" regulation of the insurance business (*supra*, p. 15). Senator McCarran, the most authoritative spokesman as to the purpose of the statute, declared that the federal statutes covered by the McCarran Act proviso would not be displaced "where States attempt to occupy the field—but do it inadequately— * * *, where the legislation fails adequately even to deal with the field it attempts to cover" (*supra*, p. 18).

In a case involving the present respondent and the same mail order insurance business it is now conducting, this Court referred to the "unwisdom, unfairness and injustice of permitting policyholders to seek redress only in some distant state where the insurer is incorporated." *Travelers Health Assn. v. Virginia*, 339 U.S. 643, 649. Although this statement related to suits by policyholders to enforce their claims, like considerations apply where the question

is whether, in the sensitive field of insurance, Congress intended to withdraw all federal protection against unwarranted or extravagant claims likely to entrap the gullible or unwary, upon the basis of certain regulatory authority vested in officials of "some distant state where the insurer is incorporated."

The view which we urge would not lead to any expansion of the domain of federal law at the expense of state regulation. Under this view, each state has full power to regulate the insurance business conducted within its own borders. But one state, the state of incorporation, could not regulate for every other state in which its corporate creature makes misrepresentations, that is, it could not regulate to the extent of thereby displacing in the other states the protection afforded by existing federal legislation. This interpretation accords, we believe, with established traditions as to the appropriate division of state and federal authority. The words of Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 316, 431, are apposite:

> Would the people of any one State trust those of another with a power to control the most insignificant operations of their State government? We know they would not. * * * In the legislature of the Union alone, are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused. * * *

Furthermore, the Federal Trade Commission and the industry (or a large segment thereof) have construed the McCarran Act as leaving in the Commis-

sion jurisdiction over mail order insurance. Although the Commission had been sharply divided (3 to 2) as to its jurisdiction over companies carrying on the insurance business through local agents, as in *National Casualty*,[12] on the facts here it was unanimous on the jurisdictional question. In his concurring opinion, the then Chairman, Mr. Gwynne, a former member of Congress who had actively participated in the debates leading to passage of the McCarran Act (*supra*, p. 6), stated (R. 60–61):

> I think this [McCarran Act proviso] refers to the laws of the state whose citizens are being affected by the advertising and not to laws of some other state operating extraterritorially.
>
> This protection [by the McCarran Act] of the individual state from the paramount federal power is difficult to reconcile with the theory of making one state subject to the laws of another state, in which laws they have had no part in making.
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> * * * * *
>
> Under the McCarran Act, a state may enact laws protecting its citizens against certain phases of insurance activity. To the extent that a state does not (or for constitutional reasons cannot) adop [*sic*] such legislation, the McCarran Act provides a secondary defense. That defense is not the laws of some other state in which the insurance company is chartered or has its principal place of business; the

[12] *In the Matter of The American Hospital and Life Insurance Company*, 52 F.T.C. 1100, 1107, 1122.

defense consists of the applicable laws of the federal government. * * *

That there was substantial concurrence by the industry with respect to the Commission's jurisdiction over mail order insurance is indicated by the Commission's promulgation, on February 2, 1950, of Trade Practice Rules applicable to Advertising and Sales Promotion of Mail Order Insurance (15 F.R. 599–602),[13] action which was "the outgrowth of a general industry conference of mail order insurers" (Donovan, *Regulation of Insurance Under the McCarran Act*, 15 Law and Contemporary Problems 473, 487). An article on state regulatory insurance laws observed that this action "probably was due, in part, also to the fact that the problem of accident and health mail-order insurers had been a troublesome one for years, and the states seemed unable adequately to deal with the problem."[14] And in the only two prior court deci-

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[13] The industry covered by these rules comprised all organizations engaged in offering insurance outside the state of domicile, through the mails or other interstate communication and without employment of any agent licensed in the state where the sale of the insurance is promoted or in which the insurance policy is to be delivered. 15 F.R. 599.

The Commission repealed the rules on August 20, 1956 (21 F.R. 6332).

[14] Brook, *Public Interest and the Commissioners'—All Industry Laws*, 15 Law and Contemporary Problems 606, 627.

With reference to the Commission's promulgation of trade practice rules for advertising of mail order insurance, the Assistant Attorney General of Kansas has stated that "many mail order accident and health insurers asked the F.T.C. to take an interest in 1949 and 1950 in order to help meet the all-industry problems that had developed", and said that these rules "were drawn up at the instigation of the industry". McCarter, *Recent Misleading and Deceptive Mail Order Accident and*

sions dealing with Commission orders directed against mail order insurance companies, the companies involved, in their appeals from the examiner's initial decisions, expressly conceded that "the Commission has jurisdiction".[15] The present respondent likewise recognized the Commission's jurisdiction, at least to the extent of conferring with the Commission's staff and submitting to it copies of respondent's advertising material (R. 70; Resp. Exs. 3–6, R. 129–132).

(2) We now turn to constitutional problems raised by the 1957 amendment by which Nebraska purported to prohibit a Nebraska insurance company from engaging in deceptive practices "in any other state". Plainly, conduct is not "regulated by State law" within the McCarran Act proviso if a state regulatory law is, as applied to the conduct in question, unconstitutional.

We do not question the power of Nebraska to regulate the character and terms of all of respondent's insurance policies. That state has power to regulate the policy terms because all of respondent's policies, even when the insured is a nonresident, are entered into in Nebraska and claims thereunder are processed and paid or rejected in Nebraska. But the Nebraska law regulating practices engaged in in other states constitutes an attempt to regulate extraterritorial conduct and stands on a different footing.

Health Insurance Policies and Advertising, 23 Insurance Counsel Journal 82, 87, 96.

[15] *American Life & Acc. Ins. Co.* v. *FTC*, 255 F. 2d 289, 290; *Automobile Owners Safety Ins. Co.* v. *FTC*, 255 F. 2d 295, 296, certiorari denied in both cases, 358 U.S. 875.

An insurance company engages in a deceptive practice when its puts in the hands of a prospective purchaser a circular containing misleading statements as to the offered insurance policy. The mere printing of such a circular is not a deceptive practice, nor is the mere mailing of it. It becomes a deceptive practice upon receipt of the circular by the addressee, and if the addressee is a nonresident the insurance company's deceptive practice is in the state of receipt, not Nebraska.

A law of Nebraska making it unlawful for a domiciled insurance company to mail from the state any misleading representation might be free from due process limitations on state power,[16] but this is not the law which Nebraska has enacted. That law declares that its purpose is to "regulate * * * trade practices in other jurisdictions"; and its prohibition runs against engaging in deceptive practices "in the conduct of the business of insurance in any other state" (*supra*, p. 20). By its terms, there would be a violation if a Nebraska corporation mailed from the State of Kansas misleading representations addressed to a Kansas, Oregon or New Jersey resident. In short, there avowedly is regulation of out-of-state conduct, indeed, regulation of conduct in a foreign

[16] Such a law might, however, be subject to the objection that Congress, by prohibiting use of the mails to defraud (18 U.S.C. 1341), has occupied the field. It has been held that the McCarran Act does not make the federal mail fraud statute inapplicable to an insurance company which is subject to state regulation with respect to misleading representations. *United States* v. *Sylvanus*, 192 F. 2d 96, 99-100, 103-104 (C.A. 7), certiorari denied, 342 U.S. 943.

country,"[17] for the evident purpose of divesting the Federal Trade Commission of all jurisdiction over the conduct of Nebraska insurance companies.

"The due process clause denies to a state any power to restrict or control the obligation of contracts executed and to be performed without the state, as an attempt to exercise power over a subject matter not within its constitutional jurisdiction." *Alaska Packers Assn.* v. *Industrial Accident Commission,* 294 U.S. 532, 540. Likewise a state "may not penalize or tax a contract entered into and to be performed outside the state, although one of the contracting parties is within the state", but the terms, obligations, and sanctions of a contract entered into within a state, even though it is to be performed elsewhere, "are subject, in some measure, to the legislative control of the state." *Id.*, 540–541. The power of a state "to control the legal consequences of a tortious act committed elsewhere" has also been denied.[18] *Id.*, 541.

The Nebraska statute here involved is not an exercise of control over the consequences or the terms of contracts made within the state; rather it baldly asserts control over deceptive practices engaged in else-

[17] The law prohibits engaging in deceptive practices "in any other * * * country" (*supra*, p. 4).

[18] *Western Union Telegraph Co.* v. *Brown*, 234 U.S. 542, one of the cases cited by the Court, set aside a recovery under the laws of South Carolina for damages resulting from delay in delivery of a telegram sent from South Carolina where the delay was not in transmission of the telegram from South Carolina, but in making delivery to the addressee in Washington, D.C. The Court said that when a state attempts "to affect conduct outside its jurisdiction or the consequences of such conduct, * * * it must fail." 234 U.S. at 547.

where. This assumption of control over what is done anywhere in the United States or in a foreign country finds no support in the *Alaska Packers* case, *supra,* or *Sligh* v. *Kirkwood,* 237 U.S. 52, upon which respondent has relied.

Alaska Packers upheld a provision of the California Workmen's Compensation Act that no contract shall exempt an employer from liability for the compensation fixed by that Act, as applied to a contract of employment (made while both parties were in California, for work to be performed in Alaska) which stipulated that the parties should be bound by and subject to the Alaska Workmen's Compensation Act. The decision merely represents recognition of the power of a state to control contracts entered into within its borders, at least if the control which is exercised is reasonable and relates to matters in which the state has a genuine interest.

Sligh v. *Kirkwood* upheld imposition of a penalty for violation of a statute of Florida which made it unlawful to sell, ship, or deliver for shipment citrus fruits which are immature or otherwise unfit for consumption, where the violation consisted of delivering to a railroad agent in Florida immature and unfit oranges for shipment to another state. Since the forbidden act of delivery was within Florida, all that the case decides is that a state's exercise of its police power is not banned merely because "interstate commerce is indirectly affected," at least in the absence of any exercise by Congress of its "supreme authority". 237 U.S. at 61.

It is a settled principle that, as between two permissible constructions of a statute, one of which raises a serious constitutional question and the other does not, the latter construction is to be preferred. Since the phrase "regulated by State law" in the McCarran Act proviso, if construed to embrace the Nebraska statute as applied to misrepresentations made to residents of other states, would require decision of a substantial question as to the constitutionality of the Nebraska statute, we submit that this construction of the McCarran Act should be rejected.

C. REPRESENTATIONS WHICH RESPONDENT MAILS FROM NEBRASKA TO OTHER STATES ARE NOT "REGULATED" BY THESE STATES WITHIN THE MEANING OF THE MCCARRAN ACT PROVISO

Respondent has no office outside Nebraska. It does not sell insurance through agents and it is licensed to do business only in Nebraska and Virginia. Under the McCarran Act, the question is not whether states, to the residents of which respondent mails representations concerning its policies, have constitutional power to exercise some control over respondent with respect to these representations. Under that Act the primary question is whether these states have enacted laws which are an exercise of any such control. A further possible question is whether any control which the law of a state might permit it to exercise would constitute regulation of the character and effectiveness contemplated by the McCarran Act proviso.

Respondent is in the best position to know what states actually regulate its business. It is therefore highly significant that, throughout this entire proceeding, respondent has never claimed that its busi-

ness is regulated by state law other than by the law of Nebraska. The hearing examiner's initial decision stated that while *Travelers Health Assn.* v. *Virginia*, 339 U.S. 643, might be interpreted as supporting the right of Virginia to regulate respondent's advertising practices within that state, respondent "makes no such contention", but contended that it was "regulated comprehensively" by Nebraska law to the exclusion of Federal Trade Commission jurisdiction (R. 22). The Commission's opinion states that respondent's jurisdictional contention was that "power to regulate the respondent's sales practices is vested solely in insurance authorities of the State of Nebraska" (R. 51).

Likewise, the basis of respondent's jurisdictional argument in its opening brief in the court below was, as stated in heading II, that "The State of Nebraska regulates in a comprehensive manner all activities of the association everywhere" (pp. 20–33).[19]

With reference to regulation by states other than Nebraska, respondent in its reply brief merely claimed (p. 12) that they are "empowered" to regulate respondent's activities. In respondent's supplemental brief, filed after this Court's decision in *National Casualty*, its contention was that "The states have the constitutional power to effectively regulate interstate insurance advertising" (p. 6), both in Nebraska (pp. 9–14) and in other states (pp. 14–16). The

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[19] The brief incidentally asserts that, under *Travelers Health*, respondent is "subject to" regulation by states other than by Nebraska and Virginia, and any state "may" take jurisdiction over respondent (pp. 22, 30).

contention as to other states was that they had "power" to regulate, not that they had enacted laws which regulate respondent's practices.

It almost goes without saying that conduct which a state has power to regulate, but has not in fact regulated, is not "regulated" by state law. In any event, Senator McCarran made this explicit. He said that if at the end of the moratorium period states "have not regulated the business of insurance, then they must take the consequences because after that period is over the Sherman Act and the Clayton Act and the other acts become immediately again in force as regards the business of insurance". 91 Cong. Rec. 1478. Moreover, the very purpose of the moratorium was to afford to the states opportunity to enact regulatory legislation (see § 4(a) of the bill as passed by the Senate, 91 Cong. Rec. 488), an opportunity which was unnecessary if mere existence of *power* to regulate would displace the federal statutes covered by the moratorium.

In *National Casualty,* this Court pointed out that 44 states had enacted the "Model Unfair Trade Practices Bill for Insurance". 357 U.S. at 564, note 6. Accordingly, we may look to Nebraska's enactment (Nebraska Laws, 1947, c. 170) to find what is regulated in other states. Section 3 of the Act provides that "No person shall engage in this state in * * * unfair or deceptive acts and practices in the conduct of the business of insurance", and on its face this language is broad enough to cover misleading statements mailed into the state by a non-Nebraska corporation not licensed to do business in the state.

However, other provisions of the Act show that the prohibition does not embrace such conduct, but is confined to deceptive acts and practices by a company residing in or having its principal place of business in the state. Section 9(2) of the Act provides that any order by the Director of Insurance to cease and desist from a deceptive act or practice shall be subject to review in the district court within the county "where the person resides or has his principal place of business". Section 11(2) provides that if the act or practice found by the Director to be unlawful has not been discontinued he may, through the Attorney General, file a petition to enjoin such act or practice in the district court of Nebraska of the district "wherein the person resides or has his principal place of business". See Reissue Revised Statutes of Nebraska, 1943, §§ 44-1503, 44-1510, 44-1516.

In the court below, 20 states [20] filed "joinders" in the amicus brief filed by the State of Nebraska with respect to the Federal Trade Commission's jurisdiction (R. 134-135). This amicus brief contended that Nebraska regulated respondent's business activities "everywhere", and made no contention that any other state regulated any part of its activities. This amounts to a concession by 20 states that they do not regulate any of respondent's activities.

The amicus brief filed in the court below by the Health Insurance Association of America made no claim that respondent's activities were regulated by

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[20] Arkansas, Colorado, Connecticut, Florida, Georgia, Iowa, Kentucky, Louisiana, Maine, Maryland, Michigan, New Mexico, New York, North Dakota, South Carolina, Utah, Vermont, Virginia, Wisconsin, and Wyoming.

any state other than Nebraska. The brief states (p. 2) that the existence of Federal Trade Commission jurisdiction in this case depends on the answer to the following questions:

> A. Does the State of Nebraska regulate the activities of petitioner outside its borders, and,
>
> B. If so, is such regulation effective to oust the Federal Trade Commission from jurisdiction?

Finally, even assuming *arguendo* that the "unfair trade practices" laws of certain states might be interpreted as applicable to misrepresentations mailed to their residents by a nonlicensed, nonresident insurance company having no local agent or office, the mere applicability of the law to mail-delivered representations would not make these representations "regulated by State law" within the meaning of the McCarran Act.

In view of the holding in *Travelers Health Assn. v. Virginia*, 339 U.S. 643, we shall assume that a cease and desist order against respondent, entered by a state insurance official in a proceeding notice of which was served on respondent by registered mail, would be valid. We shall also assume that after the same form of service a court could enter a valid injunction against respondent. Possibly, appropriate procedures might be utilized whereby the state in which the deceptive practice takes place might thereafter impose a fine or penalty for violation upon an absent out-of-state insurer. But see *Travelers Health Assn. v. Virginia, supra*, at 651, n. 5; cf. *Blackmer v. United States*, 284 U.S. 421. Even making this

dubious assumption, the question remains: How is the state, then, to enforce its penalty judgment?

Obviously, it cannot be done within the state that rendered the judgment. Respondent has no property in states other than Nebraska. Garnisheeing amounts due respondent from policyholders in the state of judgment would not be a practical means of enforcement. Not only would there be great difficulty in ascertaining who the policyholders are, but the expense of individual garnishment proceedings against individual policyholders would be wholly disproportionate to the recovery possible—the policyholders pay respondent annually a sum ranging from $12 to $64 (Comm. Exs. 1, 4; R. 76, 82).

What is more, attempted enforcement in the home state of Nebraska would offer no reasonable or adequate means of implementation. If we assume that the state official, the judgment plaintiff, would have statutory authority to institute suit in the courts of another state, it would still remain doubtful if he would feel justified in spending the time and money required to pursue that difficult and uncertain course. Certainly, it could not be anticipated that Nebraska would welcome such a suit since, if the Nebraska court sustained the action, it would either be enforcing a policy contrary to that of Nebraska or would be impliedly holding that Nebraska officials had been derelict in enforcing the state's policy.[21] Indeed, there

[21] This would be true since the representations respondent makes in other states it makes when soliciting Nebraska residents and since there are the same statutory prohibitions (the Model Unfair Trade Practices Act) in Nebraska as in other states.

is every reason to believe that Nebraska, following the traditional practice of American courts, would refuse to entertain an action designed to enforce the penal provisions of another jurisdiction. At least, it must be presumed that it would not depart from the "rule that the courts of no country execute the penal laws of another," a rule which "applies not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue, or other municipal laws, and to all judgments for such penalties." *Wisconsin* v. *Pelican Ins. Co.*, 127 U.S. 265, 290. See, also *Huntington* v. *Attrill*, 146 U.S. 657, 668–669, holding that, for purposes of suit in a foreign jurisdiction, a law is deemed penal when "the wrong sought to be redressed is a wrong to the public * * *." Cf. *Broderick* v. *Rosner*, 294 U.S. 629, 642; *Milwaukee County* v. *White Co.*, 296 U.S. 268, 271.

The question thus is not, as in this Court's *National Casualty* decision, whether conduct subject to a state regulatory law which *can* be effectively enforced is "regulated by State law" in the absence of proof as to the extent to which the law has been administratively enforced. The question is whether conduct affected by a state regulatory law which *cannot* be effectively enforced, for reasons not within the control of the enacting state, is so "regulated". We submit that in view of the legislative history of the McCarran Act (see *supra*, pp. 15–16, 18–19), this question must be answered in the negative.

The difficulty of regulation by a state which is on the receiving end of misrepresentations made by a non-licensed foreign insurance company doing solely a mail order business has long been recognized. In 1950 the general counsel of the National Bureau of Casualty Underwriters stated:[22]

> One of the more difficult problems under state regulation has been how to supervise effectively the activities of unauthorized insurers, such as companies doing solely a "mail order" business conducted outside the state.

The corollary of state inability to regulate is Federal Trade Commission jurisdiction, and the author noted, without criticism, that both the Commission and the industry had acted on the basis of this corollary, by the Commission's promulgation of fair trade practice rules for the advertising of mail order insurance, which rules were "the outgrowth of a general industry conference of mail order insurers" (*ibid.*).

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[22] Donovan, *Regulation of Insurance Under the McCarran Act*, 15 Law and Contemporary Problems 473, 487.

CONCLUSION

It is respectfully submitted that the judgment of the court of appeals should be reversed with directions to affirm the order of the Federal Trade Commission.

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OCTOBER 1959.

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* In place of the Solicitor General, who is disqualified for personal reasons.

U.S. GOVERNMENT PRINTING OFFICE 1959

No. 51

IN THE

Supreme Court of the United States

October Term, 1959

FEDERAL TRADE COMMISSION, *Petitioner*

vs.

TRAVELERS HEALTH ASSOCIATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR TRAVELERS HEALTH ASSOCIATION, Respondent

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OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (R. 134-140) is reported at 262 F. 2d 241.

JURISDICTION

Petitioner's statement is accurate.

QUESTION PRESENTED

Whether the McCarran Act deprived the Federal Trade Commission of jurisdiction to regulate *all* of the insurance business, including that segment thereof which does business by direct mail.

STATUTES INVOLVED

Petitioner (p. 2) accurately cites and quotes some of the statutes involved.

However, additional Nebraska statutes are applicable:

Section 44-101, Revised Statutes of Nebraska, 1943, Reissue of 1952, originally enacted in 1913, provides:

> "Within the intent of this chapter, the business of apportioning and distributing losses arising from specified causes among all those who apply and are accepted to receive the benefits of such service, is public in character, and requires that all those having to do with it shall at all times be actuated by good faith in everything pertaining thereto, shall *abstain from deceptive or misleading practices,* and shall keep, observe and practice the principles of law and equity in all matters pertaining to such business. Upon the insurer, the insured, and their representatives, shall rest the burden of maintaining proper practices in said business." (Emphasis supplied.)

The foregoing, as well as other Nebraska insurance statutes, is enforceable under the provisions of Section 44-125, Revised Statutes of Nebraska, 1943, Reissue of 1952 originally enacted in 1913, which provides:

> "Whenever any domestic company * * * has willfully violated * * * any law of this state * * * the department may apply to the district court, or any judge thereof, in the county or judicial district in which the principal office of such company is located,

for an order directing such company to show cause why the department should not take possession of its property, records and effects, and conduct or close its business, and for such other relief as the nature of the case and the interest of its policy-holders, creditors, stockholders or the public may require."

The Uniform Unauthorized Insurers Service of Process Act is contained in Sections 44-137.01 to 44-137.10, Rev. Stat. Neb. 1943, Reissue of 1952. This was a model law created by the National Association of Insurance Commissioners as part of the broad legislative program of the states following enactment of McCarran Act, and provides a policyholder may maintain an action at his own place of domicile irrespective of whether the insurance company is licensed and has designated an agent for service of process in the state. It has been enacted in 45 states, the District of Columbia and Puerto Rico.

The Uniform Accident and Sickness Policy Provisions Law, which was created by the National Association of Insurance Commissioners in 1950, is included at Sections 44-710 to 44-768, Rev. Stat. Neb. 1943, Reissue of 1952, as to part of the law, and Laws of Nebraska, 1957, Chapter 188, as to other portions. Actually, Nebraska had the law in substance since 1951, and the 1957 portions were merely technical in nature. This model law was a successor to what had previously been known as the Standard Provisions Law, the 1950 model being a definite improvement from the policyholders' point of view.

The 1950 Model Law has been enacted in all states, except Georgia (where it is permissible), and the District of Columbia and Puerto Rico.

This law regulates the provisions of the insurance contract being advertised.

Sections 44-750, 44-751 and 44-752, Revised Statutes of Nebraska, 1943, Reissue of 1952, enacted in 1947, provide:

> "44-750. SICKNESS AND ACCIDENT INSURANCE; MISLEADING OR DECEPTIVE ADVERTISING OR PLAN OF SOLICITATION; PROHIBITED. No company doing business in this state, and no insurance agent or broker shall use in connection with the solicitation of sickness and accident insurance any advertising copy or advertising practice or any plan of solicitation which is materially misleading or deceptive. An advertising copy or advertising practice or plan of solicitation shall be considered to be materially misleading or deceptive if by implication or otherwise it transmits information in such manner or of such substance that a prospective applicant for sickness and accident insurance may be misled thereby to his material damage."

> "44-751. SICKNESS AND ACCIDENT INSURANCE; MISLEADING OR DECEPTIVE ADVERTISING OR PLAN OF SOLICITATION; FINDING BY DIRECTOR OF INSURANCE; NOTICE OF HEARING. If the Director of Insurance finds that any such advertising copy or advertising practice or plan of solicitation is materially misleading or deceptive he shall order the company or the agent or broker using such copy or practice or plan to cease and desist from such use. Before making any such finding and order the director shall give notice, not less than ten days in advance, and a hearing to the company, agent, or broker affected."

> "44-752. SICKNESS AND ACCIDENT INSURANCE; MISLEADING OR DECEPTIVE ADVERTISING OR PLAN OF SOLICITATION; HEARING; CEASE AND DESIST ORDER; SUSPENSION OR REVOCATION OF LICENSE. If the director finds, after due notice and hearing, that any authorized insurer, licensed insurance agent, or licensed insurance broker has willfully violated any such order to cease and desist he

may suspend or revoke the license of such insurer, agent, or broker."

The Model Fair Trade Practice Act, which has been enacted in all fifty states and Puerto Rico, is contained in Sections 44-1501, et seq. of Revised Statutes of Nebraska, 1943, Reissue of 1952, enacted in 1947, pertinent provisions thereof being quoted as follows:

"44-1501. INSURANCE; TRADE PRACTICES; REGULATION. The purpose of sections 44-1501 to 44-1521 is to regulate the trade practices in the business of insurance, in accordance with the intent of Congress of the United States as expressed in Public Law 15 of the 79th Congress, by defining, or providing for the determination of, all acts, methods, and practices which constitute unfair methods of competition and unfair or deceptive acts and practices in this state, and to prohibit the same.

Source: Laws 1947, c. 170, Sec. 1, p. 507."

* * *

"44-1503. UNFAIR METHODS OF COMPETITION; DECEPTIVE ACTS AND PRACTICES; PROHIBITED. No person shall engage in this state in unfair methods of competition or in unfair or deceptive acts and practices in the conduct of the business of insurance."

"44-1504. UNFAIR METHODS OF COMPETITION; DECEPTIVE ACTS AND PRACTICES; ENUMERATION. The following are declared to be unfair methods of competition and unfair or deceptive acts and practices in the business of insurance:

(1) Making, issuing, circulating, or causing to be made, issued, circulated, any estimate, illustration, circular or statement misrepresenting the terms of any policy issued or to be issued or the benefits or advantages promised thereby, * * *"

(2) Making, publishing, disseminating, circulating,

or placing before the public, * * * in the form of a notice, circular, pamphlet, letter or poster * * * an advertisement * * * which is untrue, deceptive or misleading."

Above Section 44-1503 was amended in 1957 (Nebraska Revised Statutes, 1957 Cumulative Supplement), by the addition, of the following language:

"No person domiciled in or resident of this state shall engage in unfair methods of competition or in unfair or deceptive acts and practices in the conduct of the business of insurance in any other state, territory, possession, province, country, or district."

STATEMENT

The Statement in Petitioner's brief (p. 4-8) is substantially factually accurate.

To Petitioner's remarks relative the undisputed facts as found by the Federal Trade Commission (R. 41-42), and as also found by the Hearing Examiner (R. 19-20), we additionally quote the following from the Findings of Fact of the Commission (R. 42):

"The respondent does *no newspaper or magazine advertising,* but solicits sales by mailing * * * circular letters to 'white-collar' workers. * * * There are other letters for lapsed policyholders urging them to reinstate * * * *letters are not broadcast to the public,* but are *addressed to individuals* who have been *recommended by respondent's policyholders.*" (Emphasis supplied).

Also respondent's brief refers to the decision of this court in *Federal Trade Commission v. National Casualty Co.*, 357 U. S. 560 as holding that respondent's practices were beyond the regulatory power of the Commission.

Actually, the court held that the McCarran Act 15 U. S. C. 1011-1015, *withdrew* jurisdiction from the Commission.

SUMMARY OF ARGUMENT

Petitioner's brief (p. 8) says that in National Casualty the question of Congressional intent respecting "interstate insurance practices which the states cannot for constitutional reasons regulate effectively" was reserved. Actually, there was no "reservation." This court said:

> "Whatever may have been the intent of Congress with regard to interstate insurance practices which the states cannot for constitutional reasons regulate effectively, that intent is *irrelevant* in the case before us." (Emphasis supplied).

There is a decided difference between the specific reservation of a point and a declaration of *irrelevancy.*

Petitioner (p. 9) suggests that Congressional approval of continued state regulation (under the McCarran Act) was not intended to permit any "regulatory vacuum." We agree. No regulatory vacuum exists.

Petitioner's brief (p. 9) uses some ill-advised language in its reference to an imaginary situation where a Nebraska-domiciled insurer "bombards the residents of every other state with mail-delivered misrepresentations." Petitioner draws an unwarranted inference, unjustified in the present case, which ignores the undisputed Findings of Fact that only selected lists of white-collar workers receive our advertising material, no newspaper or magazine advertising being used, addressees being individuals who have been recommended by our policyholders; and it also ignores the fact that at the top of each of our letters of solicitation appears a caption indicating what is being ad-

vertised: "Health Insurance for Business and Professional Men and Women" (R. 86-107). It is these same white-collar specially selected business and professional men and women who petitioner (p. 9) infers will have no protection under state law against exaggerated claims likely to entrap the gullible and unwary, etc.

Petitioner (p. 10) says a substantial part of the industry (direct mail insurers) has accepted or supported an interpretation of the McCarran Act as not withdrawing from the Commission jurisdiction over such business. That statement is gratuitous and erroneous.

A. The McCarran Act withdrew jurisdiction from the Federal Trade Commission to regulate *all* of the many segments of insurance and made *no exceptions*.

The Court below said our advertising practices "are regulated by State law within the letter and spirit" of the McCarran Act, which "has placed such practices beyond the regulatory power of the Commission."

B. Nebraska, the state of domicile, is empowered to regulate the activities of its licensed companies, including direct mail insurers, everywhere.

The Commission, in its Supplemental (on reargument) Brief in the Court below, (pp. 10-11), conceded that the domiciliary state—

> "may resort to whatever measures are authorized under its own laws to compel compliance with the local statute even with respect to advertising material disseminated by that company *outside* the domiciliary state. (Emphasis supplied). The domiciliary state can go as far as to revoke the charter of a company and thus put it out of business."

The Eighth Circuit majority held:

> "With every activity of the petitioner, in the conduct of its business, subject to the supervision and control of the Director of Insurance of Nebraska, we think that the petitioner's (Travelers') practices in the solicitation of insurance by mail in Nebraska or elsewhere reasonably and realistically cannot be held to be unregulated by State law."

C. All other States are empowered to regulate the business of companies doing business by direct mail in those states. *Travelers Health Association v. Virginia*, 339 U. S. 643.

D. The 1950 Mail Order Insurance Rules promulgated by the Federal Trade Commission (rescinded in 1956) were beyond its jurisdiction; yet the Commission's approval of our basic advertising thereunder should estop the Commission.

ARGUMENT

A. The objective of the McCarran Act was to withdraw from the Federal Trade Commission jurisdiction to regulate ALL segments of the insurance business—no exceptions.

The intention of McCarran was to restore the status quo of insurance regulation as it existed prior to *Southeastern.* The regulation and taxation of *all* of the insurance business was to remain free from limitations inhering in the commerce power of Congress and in constitutional due process limitations; neither of which limited state regulation prior to *Southeastern.*

(1) The status quo prior to Southeastern and McCarran.

Beginning with *Paul v. Virginia*, 8 Wall (75 U. S.) 168,

came the long line of decisions supporting exclusive state taxation and regulation of *all* insurance. All sorts of factual situations involved many different kinds of insurance. The Commerce Clause and the due process amendment were often considered by the courts and held to be no bar to full and unlimited state regulatory power. There were no exceptions as to any segment of insurance.

Even in cases involving marine insurance, remembering that the power to regulate maritime activities generally was retained by federal authority, marine insurance was held to be subject to state regulation. Marine insurance could, with some logic, have been excepted from state regulation—no exception was made.

Congress, in 1945, enacted the McCarran Act in the light of previous and contemporaneous court decisions, among which were:

Osborn v. Ozlin (1940), 310 U. S. 53, in which this court held that Virginia could require casualty and surety policies to be written through resident agents, and "the mere fact that state action may have repercussions beyond state lines is of no judicial significance."

Hoopeston Canning Co. v. Cullen (1943), 318 U. S. 313, in which this court added that "where the business activity reach out beyond one state and create continuing relationships and obligations with citizens of another state, courts need not resort to a fictional 'consent' in order to sustain the jurisdiction of regulatory agencies in the latter state."

International Shoe Co. v. Washington (1945), 326 U. S. 310, in which this court held that where the activities of a foreign corporation have been continuous and systematic and have given rise to the liabilities upon which

suit is brought, the corporation will be deemed to be present within the state.

Osborn and *Hoopeston Canning* and other cases refused to follow *Allgeyer v. Louisiana*, 165 U. S. 578 (1897), which tended to limit the regulatory power of a state; its forcefulness was almost immediately lessened by other decisions, and in effect, it now stands rather completely ignored if not overruled.

(2) Decisions subsequent to McCarran have repeatedly considered the Commerce Clause and due process but nevertheless sustained State regulation.

The Commission fails to draw a line which would separate state regulation, as upheld in National Casualty, from Federal regulation. In *National Casualty*, it was conceded that a portion of its advertising material went directly by mail from the company to the public, but this, the court said, was "only an insubstantial amount." It is a matter of common knowledge that many insurance companies are licensed in some states and not in others, and that insurance transactions are conducted by mail in non-licensed states. Where is the line to be drawn? When will the amount cease to be "insubstantial" and become substantial? We respectfully suggest that if this court even partly opens the gate for Federal regulation, utter confusion in insurance regulation will prevail. State and federal authority will be in endless conflict. This court should as a matter of law, and realistically, avoid such doubts and confusion by affirming the court below, and hold *all* insurance subject to exclusive state regulation.

If Congress desires to amend the McCarran Act and partly open the regulatory gate, it can do so, and, after hearings and mature consideration, define the exceptions

in specific terms.

Criminal mail fraud action (as in *Sylvanus)* would still remain available for any ill-advised company which even in this enlightened day might overstep.

This court has held that Congress intended the McCarran Act (1945) to reinstate the status quo as it existed prior to *Southeastern*, before which the Federal Trade Commission had never questioned the exclusive jurisdiction of the states to regulate *all*—no exceptions—insurance.

This court speedily (1946) and comprehensively interpreted McCarran in *Prudential Insurance Co. v. Benjamin*, 328 U. S. 408, holding—

> The purpose of Congress was to support *existing* state regulatory systems. (Regulation of direct mail companies by the states was actually "existing" at time of enactment of McCarran Act.)
>
> "Future" state regulatory systems were supported. (This would include the Nebraska Fair Trade Practices Act (1947) and the 1957 amendment.)
>
> "Obstructions" flowing from its (Congress') own power, such as its power to regulate interstate commerce were removed.
>
> "Continued state regulation" of the insurance business—(Congress and the courts must have intended *all* insurance, there being no exception of direct mail or other insurance)—was declared to be in the public interest.
>
> Congress "must have had full knowledge of the nation-wide existence of state systems of regulation." The existence of direct mail insurance was then known to

Congress. As a matter of fact, at one time, Congress gave consideration to methods of assisting the states to regulate it, but never did so.[1]

State regulation was known to "differ greatly in scope and character." Nebraska's enactment of the 1957 amendment to its Fair Trade Practices Act is an addition to usual statutory techniques. Congress threw the "whole weight of its power behind the state systems, notwithstanding these variations."

The implications of the commerce clause were considered by Congress, this court referring to the fact that the states were "grappling with nation-wide, but nationally unregulated, business", and the states "exerted their powers to limits and in ways not sought generally to be applied to other business held to be within the reach of the Commerce's clauses implied prohibition."

In *Robertson v. People of California* (1946), 328 U. S.

---

[1]. In 1935 there was introduced in Congress the Hobbs Bill (H. R. 6452) which would have made it unlawful to use the United States mails for soliciting or effecting insurance, transmitting policies or collecting premiums, without first complying with the insurance laws of the state where the property insured or the subject matter of the insurance is located.

The bill was reintroduced in 1941 and again in 1943 (H. R. 687), Congressional hearings were held, but the bill was never enacted. The suggestion of Congressional action to require the licensing of a company in a state in which it conducted business through use of the mails was discarded. Later *Travelers Health Association v. Virginia* (1950), held in effect that such power and authority of the states already existed, and at any time they can require the licensing of companies doing such business in states other than that of domicile.

440, this court, without relying upon McCarran, nevertheless said that the McCarran Act, if applied, would dictate the same affirmance of conviction of an out-of-the-state unlicensed insurance agent which had been obtained under California law; this conviction being upheld against attack based on both the Commerce Clause and the Fourteenth Amendment.

The Eighth Circuit referred to interstate commerce in *North Little Rock Transportation Co. v. Casualty Reciprocal Exchange* (1950), 181 Fed. 2d 174, certiorari denied, 340 U. S. 823, holding that the purpose of McCarran was to permit the states to continue insurance regulation unhampered to the extent provided by the Act "by federal legislation relating to interstate commerce." The court held the Sherman Anti-Trust Act inapplicable because Arkansas enacted the uniform rate regulatory law, created by the National Association of Insurance Commissioners, thereby meeting the "regulated by state law" requirement of the McCarran Act.

In *Maryland Casualty v. Cushing* (1953), 347 U. S. 409, involving marine insurance, this court said the McCarran Act's "exclusive purpose was to counteract *any* adverse effect" (emphasis supplied) that the decision in *Southeastern* might have left on state regulation. Any decision that direct mail insurance can be regulated by the Federal Trade Commission would have "adverse effect" upon state regulation.

In *Wilburn Boat Co. v. Fireman's Fund Insurance Co.* (1955), 348 U. S. 310, also involving marine insurance, this court said McCarran Act was designed "to assure that *existing* state power designed to regulate insurance would continue" because the control of "*all* types of insurance companies and contracts" *has been and should be* primarily

a state function. (Emphasis ours).

In *American Universal Insurance Co. v. Sterling* (1953), 203 Fed. 2d 159 (C. A. 3), the court held that the McCarran Act "upheld *existing and future state systems* for regulating the business of insurance" (emphasis ours) citing *Prudential*.

In *Miley v. John Hancock Mutual Life Insurance Co.*, 148 Fed. Supp. 299, (1957), aff'd. 242 F. 2d 758, cert. denied 78 S. Ct. 38, the court said Massachusetts "provides a comprehensive scheme for the regulation of *all* phases of the insurance business" (emphasis ours) and specifically included in its law regulation of insurance trade practices in accordance with the McCarran Act. The issue there arose in connection with an insurance broker suing several companies under the Sherman Act.

In *McGee v. International Life Insurance Co.*, 355 U. S. 220, this court held that the mere mailing of a renewal premium notice to a California policyholder who had bought a mail order accident policy from an Arizona company, latter reinsured by a Texas Company, was enough to subject the latter to the service of process law even though neither company had ever done business in California. This emphasizes the argument that a policyholder regardless of what state in which he may reside or to which he may move, has his rights protected to sue in the court of his present residence and obtain service under the service of process law. After citing several cases, ending with *International Shoe* case, the court said that looking back over the long history of litigation, a trend is clearly discernible toward expanding "the permissible scope of state jurisdiction over foreign corporations * * * attributable to the fundamental transformation of our na-

tional economy over the years * * * a great increase in the amount of business conducted by mail across state lines * * *." The court said there was no *denial of due process*, citing *Travelers Health v. Virginia*.

In *Securities and Exchange Commission v. The Variable Annuity Life Insurance Company of America*, (March 23, 1959) —— U. S. ——, 3 L. ed. 2d 640, this court, although holding that variable annuities are securities within the meaning of the S. E. C. Act, did not disturb the language of the U. S. Court of Appeals in its May 22, 1958 opinion, —— Fed. 2d ——, holding that the McCarran Act showed "an unmistakable determination on the part of Congress to leave the insurance business in the control of the states unless Congress should in plain terms exert its power over *some or all* aspects of it." (Emphasis ours).

The result in *American Life & Accident Insurance Company v. Federal Trade Commission*, 255 F. 2d 289, 290, and *Automobile Owners Safety Insurance Company v. Federal Trade Commission*, 255 F. 2d 295, 296, certiorari denied in both cases October 27, 1958, 358 U. S. 875, (Petitioner's brief pp. 24-25) was arrived at for reasons peculiar to the record in those cases, in which the jurisdictional question was not presented.

B. Nebraska, the state of domicile, is empowered to regulate the activities of its licensed companies, including direct mail insurers, everywhere.

The states have the constitutional power to effectively regulate interstate insurance advertising.

The states had power to effectively regulate interstate insurance prior to *Southeastern*, they have such power today even apart from the McCarran Act, and most certain-

ly they have such power by virtue of that Act. Such regulation comes within the police power of the state; it does not violate due process, and it does not conflict with the Commerce Clause of the federal Constitution. The police power is the *source* of state authority while the Due Process Clause and Commerce Clause are limitations on the exercise of that authority.

The federal government has only those powers granted to it by the federal Constitution, these powers being received from all of the people of all of the states. The states on the other hand possess all powers not expressly denied to them. The police power is the general authority of a state to regulate for the protection and promotion of the public health, welfare, safety and morals. It may exercise this power to regulate all matters in which it has a legitimate interest.

Prior to *Southeastern*, the Federal Trade Commission never attempted to regulate interstate insurance advertising. Prior to that decision, the Commerce Clause did not operate as a limitation on state authority and the only question was whether the state had a sufficient interest to satisfy the police power and due process requirements. In *Prudential* the Supreme Court in speaking of validity of state regulatory statutes *prior* to *Southeastern* said:

> "And litigation of their validity came to be freed of commerce clause objections, at any rate from Deer Lodge (New York Life Insurance Co. v. Deer Lodge County, 231 U. S. 495 (1913)), on to South-Eastern. Due process in its jurisdiction aspects remained to confine the reach of state power in relation to business affecting other states. But the negative implications of the commerce clause became irrelevant, as such, for the valid exercise of state regulatory and taxing authority."

And in *Prudential* this court further said:

> "We have considered appellant's other contentions, including the suggestion that the McCarran Act, construed as we have interpreted it and thus given effect, would involve an unconstitutional delegation by Congress by its power to the states. For reasons already set forth and others, including the fact that no instance of delegation is involved on the facts, we find them without merit."

The decision in *Southeastern* subjected state authority to the limitations of the commerce clause for the first time, and the McCarran Act was enacted soon thereafter for the specific purpose of *removing* those limitations. And those limitations were removed as to *all* insurance, Congress having knowledge that a segment of that business was conducted by direct mail. Congress could have easily provided the McCarran Act shall apply to everything *except* direct mail had it so desired.

But even apart from that Act, the commerce clause did not prevent a state from regulating interstate advertising affecting its citizens. The commerce clause did not automatically deprive states of all authority to regulate interstate transactions, and the state may regulate interstate transactions if the state regulation does not discriminate against interstate commerce, if a local interest is involved and if that local interest is superior to whatever national interest there may be in the prevention of state regulation. *Robertson v. California*, supra.

As a matter of fact, State laws have regulated the direct mail writings of petitioner ever since its organization in 1904—and regulated other companies in the group known as the traveling men's associations, among the oldest of which is Iowa State Traveling Men's Association, 1882,

and Commercial Travelers of Utica (N. Y.), 1883.

In the *Robertson* case, the court, without reliance on the McCarran Act, held that regulations of a state designed to protect its citizens against practices deemed improper did not violate the Commerce Clause. The court specifically said it made no difference whether the acts in question were considered as being in interstate commerce or as merely affecting interstate commerce. Consequently, regulation by a state of interstate advertising directed to its citizens is not barred by the Commerce Clause even apart from the McCarran Act. But the McCarran Act removed all possible doubts on this score since it expressly provides that insurance shall be subject to state regulation and silence on the part of Congress shall not be construed to impose any barrier to such regulation.

In spite of the foregoing, the Federal Trade Commission mistakenly asserts, in effect, that only the federal government has the power to regulate interstate direct mail insurance transactions; that the states never had such power, even prior to the decision in the *Southeastern Underwriters* case; and that Congress did not give the states such power in the McCarran Act. That otherwise a vacuum or no man's land would exist in regulation. This is entirely erroneous.

Having shown that the states have the broad constitutional power to regulate direct mail insurance advertising, we now proceed to at least two methods of doing it, (a) by action of the home or domiciliary state, and (b) by action of and in the other states where the advertising is received and read.

(a)

Action by the home or domiciliary state.

(1)

By specific statute and insurance department rules.

The Nebraska Fair Trade Practices Act, as amended in 1957, prohibits unfair methods of competition and unfair or deceptive practices in the State of Nebraska, and prohibits such practices by a Nebraska domiciled company *in any other state.*

Nebraska Insurance Department Rule 22 adopted April 12, 1956 prescribes rules and regulations for the advertisement of accident and sickness insurance and provides for enforcement procedure, being the model rules adopted by the National Association of Insurance Commissioners in 1955, and formally promulgated by 31 states and undoubtedly followed in all states. The Nebraska Insurance Department issued its Rule 16 dated January 1, 1948 regulating such advertising (R. 132).

(2)

Through the charter power, as related to the police power and extra-territoriality.

The charter provision principle permits the laws of the domiciliary state to become a part of the corporate charter which is carried into other jurisdictions in which the corporation does business. See *Relf v. Rundle*, 103 U. S. 222, *Canada Southern v. Gebhard*, 109 U. S. 527, *Royal Arcanum v. Green*, 237 U. S. 531, *Modern Woodmen v. Mixer*, 267 U. S. 544.

The law of a state other than state of domicile may be upheld even though it affects the citizens of other states.

The case of *State Farm Mutual Automobile Insurance Co. v. Duel,* 324 U. S. 154, involved an insurance company domiciled in Illinois seeking to do business in Wisconsin which had a state statute requiring as a condition of the right to do business in Wisconsin that the unearned premiums or reinsurance reserve be computed by certain standards, even though the maintenance of such requirements affected policies written in other states. The court held that the full faith and credit clause is not violated by requiring a foreign insurance company as a condition of the right to do business in the state, to maintain unearned premiums, etc., reserves on a different basis than that required in the state of its incorporation; that said clause may not be used to compel one state to substitute the statutes of other states for its own statutes.

In order better to comprehend the effect of state regulation *outside* the boundaries of a state, the extensive regulatory power within its boundaries should be remembered. The power of a state over its domestic corporations is a very strong one under the police power; the licensing power is particularly extensive for insurance companies which are creatures of the legislature and which the state could take over if desired, or which could be excluded from certain fields. For instance, there are exclusive state funds for Workmen's Compensation in Nevada, North Dakota, Ohio, Oregon, Washington, West Virginia and Wyoming.

At one time, the extra-territorial powers of the states in regulation of insurance was held to be limited. However, modifications of former views have occurred in recent years, and the courts, due either to expansion of the insurance industry or due to pressures on the national economic structure, have broadened their views. The Com-

merce Clause has never been an obstacle to state regulation of insurance, either *before Southeastern or since.*

There is a "reserve power" in every state under its constitution to repeal, alter or amend the charters it has granted. The U. S. Supreme Court sustained an Arkansas anti-trust law which prohibited any Arkansas company from participation in any agreement or combination fixing prices whether done "in this state or elsewhere." *Hammond Packing v. Arkansas*, 212 U. S. 322. In that case, the court said, as to a foreign corporation licensed in Arkansas, the state's power to prevent a foreign corporation from continuing to do business is but the correlative of its authority to prevent such corporation from coming into the state. The prohibition against continuing to do business because of acts done beyond the state was a valid exertion of power as to a subject within the jurisdiction of the state.

The decision in the above *Travelers* case was sufficient authority to sustain the constitutionality of the Florida Uniform Unauthorized Insurers Service of Process Act. *Parmalee v. Iowa State*, (1953), 205 F. 2d 518, cert. den. 346 U. S. 877.

In *Watson v. Employers Liability Assurance Company*, 348 U. S. 66, (1954), the Court continued its trend of allowing the state of the forum to enforce its own local policy as long as it had a substantial interest, even though directly contrary to the contract in question, which was valid and enforceable under the laws of two sister states; that the Fourteenth Amendment was not violated.

(3)

Uniform Insurers Service of Process Act.

This Act is more than a method of permitting an individual private litigant to obtain service of process on

a company in an individual case. It supports a broad regulatory power in the states. The decisions make free use of the term "regulation." This model law has been enacted in 45 states, the District of Columbia and Puerto Rico.

The *McGee* case, infra, is the latest pronouncement of the Court in this connection.

(4)

The retaliatory laws of the states.

These have existed in a majority of the states for many years whereby the retaliating state, in effect, says to all other states, if you tax or regulate our insurance companies in excess of the standards we have established for your insurance companies here, we will tax and regulate yours here to the same degree. Such laws have been almost uniformly upheld, and declared unconstitutional in only one state, Alabama. The same pattern has existed for many years with regard to resident agent laws under which in many states risks within the state may be written only through agents resident in and licensed by that state, often the rate of commission to the resident agent being specified. Constitutionality of such laws has been uniformly upheld. *Osborn v. Ozlin*, supra.

Petitioner's Concessions

Petitioner concedes (p. 25) the power of Nebraska to regulate the character and terms of all of respondent's insurance policies, and its power to regulate policy terms because policies, even when the insured is a nonresident, are entered into in Nebraska and claims thereunder are processed and paid or rejected in Nebraska. The very things being advertised are the benefits under the policy terms,

and, in effect, that the company pays them when due. The truthfulness of our advertising is evidenced by the fact that we pay claims based on advertised benefits on a basis substantially higher than that of United States companies generally. (R. 69).

Petitioner further concedes (p. 26) that Nebraska could enact a valid law making it unlawful for a domiciled company to mail from that state any misleading representation, free from due process limitations on state power, but the Commisison says this is not the law which Nebraska enacted. The Nebraska enactment is even broader than the one the Commission suggests. The Nebraska law prohibits *all* unfair trade practices, of which mailing from the state of any misleading representation would be only one.

Also (p. 26) petitioner refers to *United States v. Sylvanus*, 192 F. 2d 96, 99, 100, 103, 104 (C. A. 7) Certiorari denied, 342 U. S. 943, which was a criminal prosecution for mail fraud. There the court held, in answer to the contention of defendants that the McCarran Act gave the state of Illinois jurisdiction to *regulate insurance*, that engaging in criminal fraud was not engaging in the *insurance business*.

Petitioner (p. 28) misses the significance of *Sligh v. Kirkwood*, 237 U. S. 52, our reliance upon that decision being to the point that the court held the State of Florida is interested in what its citizens do elsewhere in order to protect the good name of Florida industry (citrus fruits) everywhere beyond its borders, even though interstate commerce is affected. Likewise, *Nebraska is interested that its home domiciled insurance companies do business fairly everywhere* beyond the state's borders *in order that the good name of the Nebraska insurance industry may be*

protected. (It is a matter of public knowledge that Nebraska is an important insurance state.)

C. All other states are empowered to regulate the business of direct mail companies doing business in those states.

Travelers Health Association v. Virginia, 339 U. S. 643.

In discussing this decision (p. 33) petitioner practically concedes that regulation by states, other than state of domicile, will be upheld, but petitioner is concerned as to method of enforcing a civil penalty judgment.

Petitioner suggests that attempted enforcement in the home state of Nebraska would offer no reasonable or adequate means of implementation, inferring that Nebraska courts would refuse to entertain an action designed to enforce the penal provisions of another jurisdiction. There is no tradition in Nebraska to justify this statement. Actually, the Nebraska tradition is one of cooperation with other states, and petitioner's inference to the contrary is ill-advised.

Elsewhere in its brief, petitioner suggests that the finances and staff personnel available to state insurance departments are inadequate to permit pursuit of a non-domiciled company. Petitioner is also in error in this regard and fails to realize that through the National Association of Insurance Commissioners a very close liaison exists among and between the states resulting in cooperative regulation. Even the smaller states are staffed with diligent and conscientious personnel, sufficiently financed to regulate insurance.

The Model Fair Trade Practice Act (Sec. 44-1514, R. S.

Neb. Reissue of 1952) provides that violation of cease and desist orders entered by the Insurance Department shall be a "civil penalty" of not more than five hundred dollars for each violation.

This Court has held that a state must give credit to a foreign civil judgment even though the statute on which it was founded is not so entitled because in conflict with local policy. *Kenney v. Supreme Lodge*, 252 U. S. 411 (1920); *Williams v. North Carolina*, 317 U. S. 287 (1942); *Magnolia Petroleum Co. v. Hunt*, 320 U. S. 430 (1943).

Similarly, this Court has held that the full faith and credit clause requires a state to enforce a foreign judgment recovered in a suit which could not have been maintained under local law. *Fautleroy v. Lum*, 210 U. S. 230 (1908); *Milwaukee County v. M. E. White Co.*, 296 U. S. 268 (1935); *Titus v. Wallick*, 306 U. S. 282 (1939); *Morris v. Jones*, 329 U. S. 545 (1947).

The case of *Milwaukee County v. M. E. White Co.*, 296 U. S. 268 (1935) is of particular significance. In that case, the Supreme Court required Illinois to give full credit for a Wisconsin tax judgment against an Illinois corporation. The court held that no state can be said to have a legitimate policy against payment of its neighbor's taxes, the obligation of which has been judicially established by courts to whose judgments in practically every other instance it must give full faith and credit. This reasoning is applicable to a money judgment for civil penalties for unfair trade practices.

As illustrative of the reciprocity and close cooperation existing among the states, Section 44-710.02 of the Nebraska Insurance Code (Laws 1957, c. 188, sec. 3) provides:

"44-710.02. SICKNESS AND ACCIDENT INSURANCE; INSURER DOMICILED IN STATE; DELIVERY IN ANOTHER STATE; APPROVAL. If any policy is issued by an insurer domiciled in this state for delivery to a person residing in another state, and if the official having responsibility for the administration of the insurance laws of such other state shall have advised the Director of Insurance that any such policy is not subject to approval or disapproval by such official, the Director of Insurance may by ruling require that such policy meet the standards set forth in section 44-710.01 and sections 44-710.03 and 44-710.09."

Petitioner's Concessions

Petitioner makes a partial concession (p. 31) in admitting that the Nebraska Fair Trade Practices Act "on its face * * * is broad enough to cover misleading statements mailed into the state by a non-Nebraska corporation not licensed to do business in the state;" and petitioner adds that the prescribed method of enforcement relates to acts done within Nebraska, following with an outline of enforcement procedures, and then petitioner's brief leaves the subject hanging in midair. We accept the concession and point out that all states have the Uniform Fair Trade Practice Act and are empowered to enforce same in connection with any misleading statements mailed into such state by unlicensed companies. Local enforcement procedures are available in all states.

Petitioner (p. 33) makes a further partial concession in saying

> "* * * even assuming arguendo that the 'unfair trade practices' laws of certain states might be interpreted as applicable to misrepresentations mailed to their residents by a nonlicensed, nonresident insurance company having no local agent or office, the mere appli-

cability of the law to mail-delivered representations would not make these representations 'regulated by state law' within the meaning of the McCarran Act."

and then cites *Travelers Health v. Virginia*, practically admitting that the foreign state could proceed to regulate (including cease and desist orders).

D. The 1950 Mail Order Insurance Rules promulgated by the Federal Trade Commission (rescinded in 1956) were beyond its jurisdiction; yet the Commission's approval of our basic advertising thereunder should estop the Commission.

Petitioner says (p. 24) that there was substantial concurrence by the industry with respect to the Commission's jurisdiction over mail order insurance as indicated by the Commission's promulgation on Feb. 2, 1950 of Trade Practice Rules applicable to advertising and sales promotion of mail order insurance (15 F. R. 599, 602), which rules were repealed August 20, 1956 (21 F. R. 6332), petitioner saying that these rules were the outgrowth of *general industry conference* of mail order insurers.

The members of a small group of companies were the active movers. Other segments of the insurance industry and various state insurance commissioners attended the hearings and representatives of the National Association of Insurance Commissioners protested vigorously that the Federal Trade Commission was without jurisdiction, and that no problem was involved which could not be adequately solved at the state level.

Director Miller, the F. T. C. official conducting the hearings on December 8, 1948 and May 25, 1949 said (p. 105 of the Transcript):

"Well, your question comes down to the interpretation of this phrase in Public Law 15 'to the extent

regulated by the state.' The courts have not construed that yet and I think we must all agree that that phrase must depend upon what is eventually construed to be the proper meaning of it."

and (p. 106 of the Transcript) Director Miller said:

"The final word, as in the case of any statute, can only be given by the courts, as I see it.".

It is true that the rules having been promulgated, our Association voluntarily approached the Federal Trade Commission as to our basic advertising and the account of our voluntary cooperative relations with the Commission in that connection are pictured in this record (pp. 117-133), but at no time was there a concession or admission that the F. T. C. had jurisdiction.

After having received the approval of our basic advertising by the Federal Trade Commission (petitioner chooses to say it was the staff or a staff member), the next thing which happened to us was the filing of the present complaint without any preliminary notice whatsoever and without any repudiation or withdrawal of the approval given our basic advertising by the Commission as shown in this record (pp. 117-133).

CONCLUSION

It is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 51

FEDERAL TRADE COMMISSION,
Petitioner,
v.
TRAVELERS HEALTH ASSOCIATION

BRIEF FOR THE HEALTH INSURANCE ASSOCIATION OF AMERICA AND THE AMERICAN MUTUAL INSURANCE ALLIANCE AS *AMICI CURIAE*

WHITNEY NORTH SEYMOUR
Attorney for the Health Insurance Association of America and the American Mutual Insurance Alliance as Amici Curiae

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BRIEF FOR THE HEALTH INSURANCE ASSOCIATION OF AMERICA AND THE AMERICAN MUTUAL INSURANCE ALLIANCE AS *AMICI CURIAE*

Statement of Interest

The Acting Solicitor General has consented to the filing of a brief *amicus* on behalf of the Health Insurance Association of America and the American Mutual Insurance Alliance. The Health Insurance Association of America is a trade association of 270 insurance companies which together write approximately 80% of the accident and health insurance in the United States. The American Mutual Insurance Alliance is a trade association of 107 advance premium mutual insurance companies writing all kinds of fire and casualty insurance, including accident and health insurance.

In connection with the sale of insurance the member companies of the Association and the Alliance circulate advertising throughout the United States. This advertising, which is prepared by each company individually, is extensively regulated by various state insurance authori-

ties. The question involved in this case is whether the petitioner, Federal Trade Commission, also has authority to regulate such advertising in view of the decision of this Court in *Federal Trade Commission v. National Casualty Co.* (357 U. S. 560). Petitioner contends that applicable regulatory enactments of domiciliary states, supplemented by the regulation of other states, constitute insufficient state regulation to oust the Federal Trade Commission of jurisdiction.

A proper determination of the respective limits of Federal Trade Commission and state jurisdiction over advertising is of importance to the members of the Association and the Alliance.

Question Presented

The Court of Appeals for the Eighth Circuit decided that under the provisions of the Act of March 9, 1945, 59 Stat. 33, as amended, 15 U. S. C. §§ 1011-1015, (particularly the proviso to Section 2(b) of that Act) in view of the state regulation which exists and the decision of this Court in *National Casualty, supra*, the Federal Trade Commission is without jurisdiction to regulate the health and accident insurance advertising of Respondent.

The question presented is whether that decision is correct.

Statute Involved

The Act of March 9, 1945, 59 Stat. 33, as amended, 15 U. S. C. §§ 1011-1015 (hereafter referred to as the McCarran Act) provides:

> '*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in

the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

Sec. 2. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

Sec. 3. (a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, and the Act of June 19, 1936, known as the Robinson-Patman Anti-discrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

Sec. 4. Nothing contained in this Act shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor Relations

Act, or the Act of June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938, or the Act of June 5, 1920, known as the Merchant Marine Act, 1920.

Sec. 5. As used in this Act, the term 'State' includes the several States, Alaska, Hawaii, Puerto Rico, Guam, and the District of Columbia.

Sec. 6. If any provision of this Act, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of the Act, and the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected."

Statement of the Case

The Travelers Health Association (hereinafter referred to as "Travelers") is an insurance company incorporated under the laws of the State of Nebraska and has its principal place of business in Omaha, Nebraska. It is licensed to do business in Virginia and Nebraska.

Travelers prepares all of its insurance advertising in its home office in Omaha, Nebraska (R. 19), and distributes such advertising, by mail (R. 19), throughout the United States. All such mailing is made from the home office in Omaha (R. 19); it employs no local agents. Apparently the Company employs the same material in connection with its mail advertising to residents of Nebraska as it does to residents of other states.

The Proceedings Below

The Federal Trade Commission (hereinafter sometimes referred to as "the Commission") instituted this proceeding in 1956, alleging that certain of Travelers' advertising was deceptive. Travelers, by its answer, alleged, *inter alia*, that the Commission was without jurisdiction to

regulate its advertising of insurance since its activities, including advertising, were regulated by the insurance department of the State of Nebraska, and by the terms of the McCarran Act (59 Stat. 33, 15 U. S. C. §§ 1011-15) such State regulation was paramount and ousted the Commission of jurisdiction. The Commission, relying primarily on its decision in *American Hospital and Life Insurance Company*, (R. 52 FTC Dkt. No. 6237), rejected ths contention, and sustained its own jurisdiction. Travelers appealed to the United States Court of Appeals for the Eighth Circuit. Before decision therein, the underlying Commission decision in the *American Hospital and Life Insurance Company* case was reversed on jurisdictional grounds by the Fifth Circuit (243 F. 2d 719) in a decision subsequently affirmed by this Court, *Federal Trade Commission* v. *National Casualty Co.*, 357 U. S. 560. The Eighth Circuit, finding that this case was governed by *National Casualty*, thereupon vacated the Commission's order. One judge dissented.

Summary of Argument

The sole distinction between the instant case and *National Casualty* is that Travelers, which has no local agents, mails its advertising to, and enters into insurance contracts with, individuals who live in states wherein it is at present neither domiciled nor licensed to do business.

This distinction does not permit a different result because:

1. Nebraska, the state in which respondent is domiciled, has enacted valid legislation subjecting respondent's advertising, whether carried on within or without Nebraska, to a comprehensive regulatory scheme. It has empowered its insurance commission and its courts to invoke severe penalties for violation of these regulations.

2. Prior decisions of this Court, notably *Travelers Health Association* v. *Virginia*, 339 U. S. 643, establish that it is within the competence of a state to regulate the advertising of out-of-state insurance companies (whether licensed or not) which solicit or effect insurance contracts within that state's borders with its citizens. The Commission failed to consider below the effect which such regulation (of which there appears to be a considerable amount) would have on its own jurisdiction. It contends that since in its view, any State regulation of this respondent would be ineffective, the Commission is free to do the regulating. This attempt to establish a federal agency as interested arbiter of the effectiveness of state regulation appears to fly in the face of the statute and of this Court's decision in the *National Casualty* case and should be rejected.

ARGUMENT

I. NEBRASKA HAS AUTHORITY TO REGULATE THE ADVERTISING OF ITS DOMICILIARY INSURANCE COMPANIES WHICH ORIGINATES ENTIRELY WITHIN AND IS DISTRIBUTED BY MAIL FROM NEBRASKA, AND IS DIRECTED TO ITS OWN CITIZENS AS WELL AS TO OTHERS. IT HAS BY ITS STATUTES EXERTED THIS AUTHORITY BROADLY.

Nebraska has enacted a comprehensive statute, the Unfair Competition and Trade Practices Act of 1947 (Sec. 44-1521, Revised Statutes of Nebraska 1943, Reissue 1952) which, as amended in 1957 (Sec. 44-1501 et seq., Revised Statutes of Nebraska 1943, 1957 Cumulative Supp.) prohibits a domestic insurer from engaging in Nebraska or elsewhere in unfair or deceptive practices, and authorizes the State Insurance Director to issue cease and desist orders in such cases. Continued violation may involve penalties of up to $500 per violation or revo-

cation of the insurer's license to do business. All the advertising to which the Commission's complaint is directed is ~~drawn up~~ and distributed from Traveler's home office in Omaha, Nebraska (R. 19, 42). Apparently the identical advertising is distributed nationally—to residents of Nebraska as well as to residents of other states (R. 62-66).

There is a clear basis for the exercise by Nebraska of power to regulate such advertising. In fact, the authority of Nebraska to regulate advertising originated by its domestic insurers and disseminated from Nebraska was ultimately conceded in the court below (Commission's Supplemental Br. below pp. 10-11). In this Court, however, the Commission asserts that the Nebraska statute subjecting advertising issued by domestic insurance companies to regulation is unconstitutional ~~to the extent that it purports to~~ regulate such advertising as is sent beyond the boundaries of Nebraska. This attack does not seem to be based upon the Commerce ~~Clause and~~ indeed, in view of the McCarran Act, it hardly could be. *Prudential Insurance Company v. Benjamin,* 328 U. S. 408. On the contrary, the Commission maintains that it is beyond Nebraska's power under the Due Process clause to insist that its domestic corporations refrain from deceptive advertising in order to continue to enjoy the franchise granted by the state.

It is elementary that no State need grant a corporate charter or a license to do business if it does not wish to do so, and, generally speaking, it may condition its grant upon such reasonably related matters as it sees fit. What Nebraska has done here is to condition its grant of the right to do business as a domestic insurance company upon compliance with the various provisions of the Unfair Competition and Trade Practices Act of 1947, including the provision which prohibits Respondent from mailing to other states literature which the Nebraska authorities find objectionable. This is not constitutionally offensive.

"The right of forming a corporation and of enjoying the privileges resulting from incorporation is regarded in Anglo-American law as involving the grant of a franchise, a privilege given by the state. A corporation, therefore, cannot be created except under authority from the state. The privilege when granted may be accompanied by conditions upon its grant and upon its continued exercise such as the legislature may impose within large limits of discretion.

The privilege of being and acting as a corporation is nonetheless a grant by the state merely because the state prescribes in a general corporation law certain conditions upon which it may be acquired by all applicants." (Ballantine on Corporations p. 64)

Seemingly dispositive of Nebraska's right to regulate activity of its licensed corporations is the decision of this Court in *Hammond Packing Company* v. *Arkansas*, 212 U. S. 322 upholding, against a due process attack, the validity of an Arkansas statute which as applied prohibited foreign corporations licensed to do business in Arkansas from engaging in certain monopolistic practices outside of Arkansas and assumed not to affect Arkansas citizens. Since the penalties imposed included fines as well as loss of license and were applied to a licensed foreign corporation rather than a domiciled corporation, the decision therein upholds an even broader power of an enfranchising state than that in issue here.

While this Court has held that the power of a state over its domiciliary corporations may not be extended to effect a deprivation of certain fundamental constitutional rights*, the right to disseminate false advertising can hardly be regarded as such a right. In support of its apparent contention to the contrary, the Commission cites only a dictum

*See *Terral* v. *Burke Construction Co.*, 257 U. S. 529.

from *Alaska Packers Association* v. *Industrial Accident Commission*, 294 U. S. 532, to the effect that the Due Process clause prohibits a state from exercising control over contracts executed and to be performed without the State.* This dictum seems to be rather remote from the question involved here—whether a state's attempt to prohibit its domestic insurance companies from sending false advertising to persons living outside the state is void and should be treated as if it were no regulation at all.

It is suggested by the Commission that the mere printing and mailing of a circular containing false advertising is not deceptive or regulatable but that the misrepresentation occurs when the circular is put into the hands of the prospect. Since this act occurs outside the State of Nebraska, the Commission urges that Nebraska's regulation must be disregarded. The fact is, however, that the State of Nebraska asserts jurisdiction over the advertising before it is placed in the mails and to forbid the distribution of such advertising as it finds deceptive. (R. 71, 73.) In *Sligh* v. *Kirkwood*, 237 U. S. 52, this Court considered a Florida statute which (as interpreted) forbade the export to other states of oranges not meeting the statutory standards. Although it was there argued that such a regulation constituted an attempt by Florida to regulate interstate commerce and further to regulate a matter with which it had no legitimate concern, this Court rejected both arguments and sustained state regulation as a valid exercise of state police power. This case would seem to dispose of any contention that the exercise by Nebraska of power to regulate the advertising here in suit is improper. Although on the Commission's reasoning, it might have been said there that

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*The case actually held that where a contract of employment was entered into in California for work to be performed in Alaska, that contract could be regulated by the State of California. The decision in the *Alaska Packers'* case thus generally supports Respondent's position.

no harm occurs until the purchaser bites the orange, the Court upheld the statute. The state's power over bad advertising should be a least coextensive with its authority over bad oranges.*

Moreover, the Commission's argument, which denies the power of Nebraska to regulate on the basis that the only deceptive and therefore regulatable act is the delivery of the advertising to the prospect (which occurs outside of Nebraska), would seem to raise serious questions concerning the Commission's own jurisdiction in view of this Court's holding in *Federal Trade Commission* v. *Bunte Brothers, Inc.*, 312 U. S. 349. In that case, the Commission sought to enjoin a corporation from selling candy in Illinois by a method which the Commision found to be unfair. This Court held that the Commission was without jurisdiction to do so because the sale was essentially local, although concededly it affected interstate commerce because it affected the interstate competitors of the respondent. Since that time it has been clear that the jurisdiction of the Commission extends only to those matters which are "in" commerce rather than the rather broader category of events "affecting" commerce. If the only regulatable act occurs at the time and place that the deceptive circular is delivered to the prospect, as the Commission here asserts, it would seem that the transaction had been removed from the channels of commerce before the deceptive act occurred and therefore that the Commission would be without jurisdiction.

Finally, the Commission suggests that the Nebraska statute does not in fact prohibit the mailing of deceptive advertising from Nebraska but "baldly" seeks to regulate the deceptive act which occurs when the material is delivered. It suggests that there would be a violation of the

*It should be noted that the statute involved in *Sligh* v. *Kirkwood* was subject to attack not only under the Due Process clause but also under the Commerce clause, a feature not present in this case. *Prudential Insurance Co.* v. *Benjamin*, 328 U. S. 408.

Nebraska statute if the Nebraska corporation mailed from Kansas misleading representations addressed to a Kansas resident and that this would be beyond Nebraska's reach. This is a hypothetical problem not presented on the record and its solution should await a case which presents it. Certainly this case does not permit the Commission to assert jurisdiction on such a ground and this Court will not consider questions of validity out of context. Cf. *Yazoo & Mississippi Valley R. R.* v. *Jackson Vinegar Co.*, 226 U. S. 217.

Under the statute Nebraska's Insurance Director has ample authority to examine the advertising complained of here. He has a very similar power to that possessed by the Commission, with perhaps even greater sanctions, to prevent further distribution of advertising he finds improper, since, like the Commission, he exercises his jurisdiction at the source of such advertising to preclude, *ab initio,* its dissemination. Thus, if the Nebraska Director had found the advertising herein fraudulent, as he was by statute empowered to do, he could have precluded its dissemination (in the only manner the record shows it has been disseminated, from within Nebraska) as fully as the Commission might. It is true that the Nebraska authorities have decided that the advertising in question is not fraudulent and declined to prohibit its dissemination. The Commission disagrees with this finding. It is clear that under the McCarran Act Congress has not authorized the Commission to sit in judgment on the authority or decisions of the state regulatory agencies.

II. NON-LICENSING AND NON-DOMICILIARY STATES HAVE AMPLE AUTHORITY TO REGULATE THE DISSEMINATION TO THEIR RESIDENTS OF ADVERTISING ORIGINATING OUTSIDE THEIR BORDERS. THE CHARACTER AND DEGREE OF THE EXERCISE OF SUCH POWER IS A QUESTION NOT CONSIDERED BY THE COMMISSION BELOW.

For the reasons just discussed, it affirmatively appears on this record that the advertising which the Commission seeks to regulate is already regulated by Nebraska. On the present record it is difficult to determine the extent to which other states have exercised their power to regulate mail-order advertising by foreign insurers.* At the present time every state (including, with respect to advertising, Oregon) and the Commonwealth of Puerto Rico appear to have enacted some version of the Model Fair Trade Practices Act proposed by the National Association of Insurance Commissioners which condemns and prohibits fraudulent advertising of insurance within their states and establishes a means of control. There is a question of interpretation of the Model Fair Trade Practices Act, however, as to its application to non-domiciled, non-licensed insurers, and no case appears to have passed upon its applicability thereto. While the Commission in its brief here

*The Commission in its brief (pp. 30-33) mentions statements selected from the briefs of respondent and certain *amici curiae* filed in the Court below in support of its argument that no other state besides Nebraska purports to regulate respondent's activities. As a matter of fact, there is extensive state regulation. (See text discussion immediately following). Beyond this, however, it must be noted that all of the briefs *amicus curiae* were filed prior to the decision of this Court in the *National Casualty* case, and were accordingly directed to the Commission's jurisdictional theory held erroneous in that decision. (Petitioner's Brief, p. 6). The brief on behalf of the Health Insurance Association of America expressly disclaimed any attempt to inquire into the extent or adequacy of state regulatory enactments. Petitioner has at all stages in this proceeding argued that its activities were "subject" to regulation by the non-domiciliary states.

(Brief, pp. 31-32) and Commissioner Gwynne in his concurring opinion below (R. pp. 56, 57), interpret the Nebraska version of the Model Act as referring only to domiciled or licensed insurers, each rests the position taken on different phrases of the statute. It is submitted that none of the language relied upon is dispositive.* These very differences emphasize the undesirability of construing the McCarran Act to give the Commission authority to pass upon the aptness of state regulation.

In spite of this absence of authority upon the question of the applicability of these particular state regulatory enactments relating to advertising by non-licensed foreign insurers in other states besides Nebraska and Virginia, certain facts are clear. Every state legislature has passed statutes making illegal the false and fraudulent advertising of insurance within its boundaries. Each state has ample power to enact legislation to control such behavior, even when carried on in the manner here complained of. Many state legislatures have shown an awareness of the problem presented by foreign insurers and have taken steps to control such activities. Thus, 45 states (and Puerto Rico) have passed the Uniform Non-Licensed Insurers Service of Process Act, which provides for service of process by mail upon unauthorized insurers in all actions based upon policies and at least affords local citizens a remedy by private suit.** At

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*It should be noted that the language relied upon in the Commission's brief before this Court (p. 32), taken from Section 9(2) of the Nebraska Act does not appear in the Model Act, though the language relied upon from Section 11(2) is taken therefrom. The practice of the insurance departments of various states sheds little further light upon their interpretation.

**While the latter act has been applied and enforced in several suits by private persons,—its constitutional validity was sustained in *McGee* v. *International Life Ins. Co.*, 355 U. S. 220,—and while the version adopted in at least one state, North Dakota, expressly applies to regulatory proceedings, as does a similar statute of Virginia which was before this Court in *Travelers Health Association* v.

least ten states absolutely prohibit their domestic insurers from making sales in states where they are not licensed; eight others do so where the foreign state has enacted reciprocal legislation. Beyond these statutory enactments, the regulatory bodies of several states, notably the New York Superintendent of Insurance, have for many years exercised a supervisory control over the practices, local or out-of-state, of all insurers who do business under their licenses or charters. The insurance commissioners themselves comprise a continuing and effectively cooperating, if informal, body which helped to draft the McCarran Act and the Model Fair Trade Practices Act, and is in periodic communication, as a body or through its committees, on matters of concern to its membership. Thus, there is an available working system of interstate coöperation and intelligence.

In the face of comprehensive state efforts directed toward the regulation of insurance advertising (the constitutionality of which the Commission does not appear to challenge), the failure of the states to regulate respondent in the manner the Commission may desire can be most rationally explained as the result of satisfaction with the steps already taken. Certainly, against the foregoing complex of regulation, it is exaggeration to say that the states have left this area unregulated. This is certainly not the view of the state insurance commissioners themselves. On

Virginia, 339 U. S. 643, there appear to be no cases passing upon the applicability of such a procedure to state regulatory activities.

While this Act may not effect a broadened application of state "regulation" by agency-action, it clearly constitutes state action to control foreign insurers. All of these Acts recognize mere solicitation as grounds for substituted service of process. While the actions so permitted are usually confined to "actions arising out of a contract of insurance," it is evident that this restriction is not itself dispositive. Misrepresentation that results in "no sale" would seem also to be regulatable but, of course, since it involves no loss, perhaps the states have not been particularly concerned with it.

November 29, 1957 a special committee of the National Association of Insurance Commissioners and the five members of the Federal Trade Commission met in Washington to consider problems of mutual interest in the regulation of the advertising practices of health and accident insurance companies. At the conclusion of the discussion, the NAIC conferees reported in part as follows:

> "Federal Trade Commission will refer information or inquiries received by it to the insurance commissioner of the state from which the information or inquiry originates. Each insurance commissioner receiving such a communication from F. T. C. will proceed with investigation and any necessary action if the insurer involved is domiciled in his state. If the insurer is domiciled in another jurisdiction, the commissioner will cooperate with the commissioner of the state of domicile in carrying out investigation and indicated actions. This procedure can be fully effective because the laws and the authority of the insurance commissioner of the state of domicile govern advertising practices of insurers in every jurisdiction; this universal jurisdiction of the state of domicile is effectively supplemented by the jurisdiction of the state in which false or deceptive advertising is published. The commissioner who receives such information or inquiry from Federal Trade Commission will acknowledge its receipt." (Vol. I 1958 Proceedings of the N. A. I. C. 69)

As a general proposition, the Commission has the obligation, in asserting its jurisdiction over any area traditionally regulated by the states, to consider the factual basis of such an assertion. See *Connecticut Light & Power Co. v. Federal Power Commission*, 324 U. S. 515, 532, where the Court, in construing a somewhat similar provision of the Federal Power Act, wrote:

> "* * * We have said, and it is applicable to this case, that 'Where a federal agency is authorized to

invoke an overriding federal power except in certain prescribed situations and then to leave the problem to traditional state control, the existence of federal authority to act should appear affirmatively and not rest on inference alone. *Yonkers* v. *United States*, 320 U. S. 685, 692; *Florida* v. *United States*, 282 U. S. 194, 211-12; cf. *Palmer* v. *Massachusetts*, 308 U. S. 79, 84; *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349, 351. Nothing except explicit findings excluding the grounds of state control gives assurance that the bounds of federal jurisdiction have been accurately understood and fully respected, and that state power has been considerately and deliberately overlapped.

The findings and opinion of the Commission leave us in doubt, to say the least, as to whether what we consider limitations on the jurisdiction of the Commission were so considered by it. The only specific reference to the subject is the statement that 'Respondent's contentions that it is subject to regulation by the Public Utilities Commission of the State of Connecticut and therefore not subject to the regulation provided by the Federal Power Act must be rejected,' citing *Northwestern Electric Co.* v. *Federal Power Commission*, 125 F. 2d 882, and *In the Matter of Hartford Electric Light Co.*, 2 F. P. C. 502, aff'd 131 F. 2d 953. In both of those cases factual differences in reference to the status of the company as a public utility were involved, and we agree with the Commission that once a company is properly found to be a 'public utility' under the Act the fact that a local commission may also have regulatory power does not preclude exercise of the Commission's functions. Cf. *Northwestern Electric Co.* v. *Federal Power Commission*, 321 U. S. 119. But such a rejection of state control as grounds of exemption must be preceded by the finding, giving due weight to the policy declaration in doubtful cases, that the company in question is a 'public utility' by reason of ownership of facilities not used in local distribution." [324 U. S. at 532-33]

The wording of the proviso to Section 2(b) of the McCarran Act, by its negative form of expression "to the extent that [insurance] business is not regulated by State law" also implies a similar obligation on the part of the Commission in asserting Federal jurisdiction grounded on the proviso. Thus, it is incumbent upon the Commission to inquire into the presence or absence of such legislation on a state-by-state basis. It did not do this, obviously because its decision was rendered at a time (before *National Casualty*) when it was laboring under a misapprehension as to the basis of its own jurisdiction.

The Commission seeks to meet this obstacle by arguing that whatever jurisdiction such states may properly have is irrelevant because it cannot be effectively enforced. As it concedes, however, by reason of *Travelers Health Association v. Virginia*, 339 U. S. 643, the ultimate power of a state to enact statutes regulating the advertising of insurance companies who seek to enter contracts with its residents, is now well established, as is the proposition that under an appropriate state statute a non-licensing state may acquire personal jurisdiction of such foreign companies (at least with respect to advertising) by serving its process by registered mail. See *Travelers Health Association v. Virginia, supra*; *McGee v. International Life Insurance Co.*, 355 U. S. 220. Thus, the Commission's argument comes to rest upon the proposition that ~~even such a full exercise of~~ this potential jurisdiction will not constitute effective regulation. This it asserts is so, not by any constitutional limitation upon the power of such states, but by reason of the unavailability at their suit of any property subject to execution.

The Commission in its brief below went far to expose the weakness of this position, pointing out (Brief below, p. 37) that it was by reason of this Court's decision in *Travelers Health Association v. Virginia, supra*, upholding

the constitutionality of such a means of service, that respondent "unquestionably" was driven to submit to Virginia's licensing requirements. For, as this Court pointed out in *Travelers Health Association* v. *Virginia, supra,* a foreign state is far from powerless to enforce its judgments against out-of-state business. While garnishee proceedings against policy holders are or may be a tedious method of recovering sums due, they put effective pressure upon the foreign insurer. See *Travelers Health Association* v. *Virginia, supra,* at 649.*

Aside from objections to the argument on factual grounds, it shows the vice in permitting the Commission to attempt to sit in judgment on the effectiveness of state regulation. Such an inquiry as this argument requires would be burdensome and in the end would permit the Commission to roam at large in applying its own notions of what is and what is not factually effective regulation. This is the result which Congress sought to avoid in passing the McCarran Act. Congress reserved the power, should state regulation prove inadequate, to reintroduce Federal jurisdiction by subsequent legislation. For the present, however, Congress is committed to the proposition that:

> "We believe that all the wisdom is not here in Congress. We believe that there is some wisdom left in the legislatures of the various States, and

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*The Commission argues in support of its contention that the State of Nebraska would very likely be unwilling to entertain actions by foreign insurance commissions to enforce final judgments obtained against its domiciled insurers. Such speculation as to future decisions of state courts is a dubious and unproductive enterprise. It should be noted, however, that this Court's most recent pronouncement on the doctrine asserted in *Wisconsin* v. *Pelican Insurance Co.*, 127 U. S. 265 (which indicates Nebraska need not entertain such an action if it does not wish to), disapproved of this decision so far as it broadly implies that a state is not required by full faith and credit to impose judgments contrary to its own public policy, and has left open the applicability of full faith and credit to foreign penal judgments. See *Milwaukee County* v. *M. E. White Co.*, 296 U. S. 268, 279.

> that they should exercise their judgment and regulate insurance, except in the respects which we have enumerated." [91 Cong. Rec. 1481]*

To similar effect, this Court observed in *Prudential Insurance Co.* v. *Benjamin*, 328 U. S. 408, 430:

> "* * * Congress must have had full knowledge of the nation-wide existence of state systems of regulation and taxation; of the fact that they differ greatly in the scope and character of the regulations imposed and of the taxes enacted; and of the further fact that many, if not all, include features which, to some extent, have not been applied generally to other interstate business. Congress could not have been unacquainted with these facts and its purpose was evidently to throw the whole weight of its power behind the state systems, notwithstanding these variations."

As the Commission's recital of the legislative history shows, the intent of Congress in passing the McCarran Act was to preserve intact, neither expanding nor contracting, the existing jurisdiction of the states over insurance. Clearly Congress rejected, as a criterion to be used in determining whether the Federal Government had jurisdiction, the fact that the states might not be as effective in regulating the business of insurance as the Federal Government. Indeed, it was suggested by the bill's opponents (and admitted by its friends) that the states might deliberately permit violations of the various Federal regulatory acts. (91 Cong. Rec. 1478-1481). All such considerations were rejected in the form in which the legislation was adopted.

Therefore, aside from the fact that Respondent's activities seem to be subject to comprehensive regulation by Nebraska and may also be subject to regulation elsewhere so that all of the requirements of the McCarran Act are

*Statement by Senator Ferguson.

satisfied, the argument that no such regulation can in the nature of things be effective is merely a reargument of a matter which Congress has laid at rest.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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No. 51

IN THE

Supreme Court of the United States

October Term, 1959

FEDERAL TRADE COMMISSION, *Petitioner*

vs.

TRAVELERS HEALTH ASSOCIATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF ATTORNEY GENERAL OF NEBRASKA, AMICUS CURIAE

IN WHICH THE SEVERAL STATES SHOWN HEREIN HAVE JOINED THROUGH THEIR ATTORNEYS GENERAL

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INTEREST OF THE STATES

The Attorney General of Nebraska was one of a large number of Attorneys General who joined in the amicus curiae brief of the Attorney General of Michigan in the case of *Federal Trade Commission v. National Casualty,*

357 U. S. 560 (No. 435, October Term, 1957). This court there held that the McCarran Act, 15 U. S. C. Secs. 1011-1015, enacted shortly after *United States v. Southeastern Underwriters Association*, 322 U. S. 533 (1944), prohibited the Federal Trade Commission from regulating the company's advertising practices under the facts and circumstances involved in that case.

The Federal Trade Commission now takes the position that *National Casualty* is not controlling in the present case, which involves a Nebraska domiciled company doing business solely by direct mail, without the intervention of agents.

This contention of the Commission is of serious concern to the states because if sustained, it would result in dual regulation, and this the McCarran Act did not contemplate because Sec. 2(b) of the Act provides that the Federal Trade Commission Act shall be applicable to the business of insurance (only) to the extent that such business is not regulated by state law.

If this claim of the Federal Trade Commission is sustained, the purpose of the McCarran Act will be thwarted and confusion in insurance regulation in phases beyond and apart from the direct mail insurance business will result. For instance, the numerous companies, doing business through agents but licensed in only part of the states, are known to transact business by mail with policyholders in non-licensed states and the drawing of a line between state jurisdiction and federal jurisdiction would be an impossible task. Unlimited litigation might well result if the Commission's position is sustained.

Over a long period of time the states had developed

comprehensive regulatory systems governing insurance. Each state had an insurance department headed by a state official and staffed by examiners, actuaries and others experienced in the insurance business. Each state had a detailed set of laws designed specifically for regulation of this business. These laws govern all aspects of the business, including such matters as the licensing of companies and agents, approval of policy forms, examination of financial stability, regulation of reserve requirements, supervision of investments, election of officers and directors, regulation of unfair or deceptive acts or practices, and, in the cases of some types of insurance, the rates which may be charged.

As one part of this regulatory system, the states have for many years concerned themselves with insurance advertising. Prior to the McCarran Act, most of the states had provisions in their insurance codes regulating such advertising in one form or another. Subsequent to that Act, the states adopted the Model State Fair Trade Practices Act, which is patterned after the Federal Trade Commission Act, contains the same broad proscription against all "unfair methods of competition or unfair or deceptive acts or practices," and specifically prohibits the use of misleading advertising in connection with *all* types of insurance, not merely sickness and accident. This Model Act was sponsored by the National Association of Insurance Commissioners and was enacted by the states for the specific purpose of accepting the invitation to state regulation expressed by Congress in the McCarran Act. The Model Act is in force in all fifty states and Puerto Rico.

In the case at bar, the Federal Trade Commission claims that despite the McCarran Act it has jurisdiction over all advertising used in connection with the interstate direct

mail sale of insurance regardless of the existence of state statutes regulating the same advertising. In its brief in this Court, the Commission contends that the states cannot "effectively" regulate interstate direct mail insurance transactions, so that in the absence of federal control there would be a regulatory void.

The position of the Commission seriously concerns the states for at least two reasons:

First, the broad contention that the states cannot effectively regulate *interstate insurance transactions* including direct mail business is a challenge to the efficacy of all state regulation. In the McCarran Act, Congress "put the full weight of its power behind" state legislation, as this Court held in *Prudential Insurance Co. v. Benjamin*, 328 U. S. 408, 431 (1946). Yet the Federal Trade Commission now says that nevertheless there would be a regulatory void as to direct mail insurance in the absence of federal regulation.

Second, the Commission's position would nullify both the basic purpose and the express language of the McCarran Act. The Act declares "that the continued regulation and taxation by the several States of the business of insurance is in the public interest," and that "the business of insurance * * * shall be subject to the laws of the several States which relate to the regulation or taxation of such business." The states have acted in the belief that by this language Congress meant that the states (not the federal government) should have the responsibility for the regulation of all of the insurance business. More specifically related to the present issue, the proviso of Section 2(b) of the McCarran Act states that after the moratorium period the Federal Trade Commission Act "shall be applicable to the business of insurance to the extent that such

business is not regulated by State law." The states have understood this provision to be an invitation to the states to enact legislation covering the area of Federal Trade Commission Act, and a declaration that to the extent the states do so the federal Act shall not be applicable. Pursuant to this invitation, the states have since the enactment of the McCarran Act adopted numerous statutes designed to regulate in this area and thereby make federal regulation unnecessary. The instant position of the Federal Trade Commission, however, would result in nullifying in part the invitation and declaration by saying that state laws in this interstate direct mail area are ineffective and state action in adopting regulatory statutes of this nature as related to direct mail business are nugatory in so far as Commission jurisdiction is involved.

SUMMARY OF ARGUMENT

The proviso of Section 2(b) of the McCarran Act states that the Federal Trade Commission Act and the other federal Acts there named "shall be applicable to the business of insurance to the extent that such business is not regulated by State law." Despite this language, the Commission contends that it has jurisdiction over all advertising used in connection with the interstate direct mail sale of insurance regardless of the existence of state laws regulating the same advertising in every state.

The Commission concedes that the states have the power generally to regulate interstate insurance transactions except direct mail without limitation from the *commerce clause*. It argues that the states cannot effectively regulate interstate direct mail insurance advertising, thus the proviso should be construed to mean that the federal Act is applicable to the extent that the business is not "effectively" regulated by state law.

I.

Consideration of the purpose for which Congress enacted the McCarran Act refutes the Commission's contention. Prior to *South-Eastern Underwriters,* insurance was not considered to be commerce, and the states had full responsibility for the regulation of *all* insurance business, unrestricted by the commerce clause. The *prime purpose of the McCarran Act was to repose in the states both the authority and the responsibility* for the regulation of the business of insurance,—all insurance, no exceptions.

To accomplish that purpose, *Congress removed all commerce clause limitations* on state regulation of insurance. In Section 3(a) Congress established a three-year moratorium during which the Federal Trade Commission Act and other federal Acts there named "shall not apply" to the business of insurance. Thereafter, the proviso of Section 2(b) became operative to the extent there described.

II.

The Commission's contention that the proviso of Section 2(b) should be construed to make the Federal Trade Commission Act applicable to the extent that direct mail insurance is not "*effectively*" regulated by state law is in conflict with the language and the legislative history of the proviso. Moreover, the Commission is in error in asserting that a state cannot effectively regulate insurance advertising reaching its citizens through interstate direct mail channels.

The Commission is seeking to amend the proviso. Its construction would require the *addition of the word "effectively,"* so as to make the proviso read that the Federal

Trade Commission Act "shall be applicable to the business of insurance to the extent that such business is not [effectively] regulated by State law." Not only does such a construction find *no support in the statute,* but it is *refuted by the legislative history.*

ARGUMENT

A. The Language of the Proviso

The proviso of Section 2(b) of the McCarran Act states that the Federal Trade Commission Act and the other federal Acts there named "shall be applicable to the business of insurance to the extent that such business is not regulated by State law."

This proviso expressly defines the "extent" to which the Federal Trade Commission Act is to be applicable. It does not say that the Federal Trade Commission Act shall be applicable "to the extent" that insurance transactions are "in" interstate commerce, or to the extent that the Commission might consider state regulation to be ineffective. It says that the Federal Trade Commission Act is to apply to insurance "to the extent that such business is not regulated by State law." This can mean only one thing. If the matter is regulated by state law, the Federal Trade Commission Act is not to apply.

B. The Purposes of the McCarran Act

For 75 years prior to the *South-Eastern Underwriters* decision, insurance was not considered to be commerce. As a result, the federal government had made no attempt to regulate this important business. Full responsibility in this regard had rested on the states, and in meeting that responsibility the states had adopted comprehensive systems of *all* insurance regulation. Under these circum-

stances the states had "inevitably exerted their powers to limits and in ways not sought generally to be applied to other business held to be within the reach of the commerce clause's implied prohibition." *Prudential Insurance Co. v. Benjamin*, 328 U. S. 408, 417 (1946).

The *South-Eastern Underwriters* decision cast doubt on the validity of many of these state statutes, and also created problems with respect to the application to insurance of various federal statutes which pertained to commerce generally, but which Congress had adopted without having insurance in mind. Congress enacted the McCarran Act to eliminate this confusion. The Act's basic purpose is clearly expressed in Sections 1 and 2(a). Section 1 declares "that the continued regulation and taxation by the several States of the business of insurance is in the public interest." Section 2(a) provides that "the business of insurance * * * shall be subject to the laws of the several States which relate to the regulation or taxation of such business,"—*all* insurance business, including direct mail.

This purpose is further carried out by Section 3(a) and the proviso of Section 2(b). Section 3(a) established a moratorium during which the Federal Trade Commission Act and the other federal Acts there named "shall not apply" to the business of insurance. After the moratorium, the proviso of Section 2(b) came into play, stating that those statutes "shall be applicable" to insurance to the extent there described.

The intent of Congress is thus made clear. Its obvious purpose was to repose in the states not only the authority but also the responsibility for the regulation of *all* of this business. That is the meaning of Sections 1 and 2(a). Congress wanted to make certain, however, that the in-

surance business would be regulated within the area covered by the statutes named in Section 3(a) and the proviso of Section 2(b). Since this was to be the responsibility of the states, Congress gave them three years during which to revise their laws to undertake that responsibilty. To the extent that the states did so, the federal Acts were not to apply; to the extent that the states did not do so, the federal Acts were to apply so as to eliminate the possibility of a regulatory void in these areas.

It is significant to note that the states uniformly understood the statute as inviting them to assume the responsibility for the regulation of *all* insurance, and acted accordingly. Following the enactment of the McCarran Act, the states, at the suggestion of the National Association of Insurance Commissioners, adopted several types of uniform insurance laws which were specifically designed to legislate in the areas covered by the Federal Trade Commission Act and the other federal statutes named in the proviso. Most pertinent for present purposes is the Model State Fair Trade Practices Act. That Act is patterned after the Federal Trade Commission Act, and specifically prohibits misleading insurance advertising as well as other unfair or deceptive acts or practices. Direct mail insurance is not excepted from its provisions.

In December, 1955, the National Association of Insurance Commissioners promulgated a set of Rules Governing Advertisements of Accident and Sickness Insurance, which implement the state statutes by spelling out in detail the standards to be applied in determining whether advertising is misleading. A copy of these Rules is reproduced as Appendix "A" hereto. A great majority of the states have adopted these rules. It is to be noted that among other things the Rules require each company to file an-

nually a certificate stating that it has complied with the Rules and the underlying state statute. Also, each company is required to maintain a complete file of all advertising used, which is subject to regular and periodical inspection by the state Insurance Department. *These rules make no exceptions, and apply to direct mail as well as other segments of the accident and sickness insurance business.*

Additionally, the National Association of Insurance Commissioners has prepared an Interpretive Guide which the Association has recommended for informal use by the various state Insurance Departments and the companies. The Guide is considerably more detailed than the Rules.

The insurance business is extremely competitive. A substantial insurance business—other than accident and sickness—is done by direct mail. Whenever a company engages in an unfair competitive practice, competing companies are quick to bring the matter to the attention of the state Insurance Department. Policyholders within a state have ready access to their state Insurance Department for the purpose of complaining about any practice which they consider unfair. Most all of these matters are handled informally. Formal procedures are available if considered to be desirable or necessary. Complaints of substance are handled directly by the Insurance Commissioner or a member of his staff with the company involved. Since a state Insurance Department maintains constant supervision over the companies doing business in the state and has substantial enforcement powers, often including the authority to revoke a company's license for any law violation, this type of action brings immediate correction where necessary. This informal procedure may be readily applied to correct insurance advertising practices considered

to be misleading or otherwise improper. State Insurance Commissioners have on a number of occasions taken such action. All that has been said here applies to direct mail transactions of *all* insurance, not merely accident and sickness.

C. The Legislative History of the McCarran Act

Since the language of the proviso of Section 2(b) is clear, it is unnecessary under well established principles to turn to its legislative history as an aid to construction. Reference to this history, however, makes doubly clear the error in the Commission's attempted construction.

The proviso was added in conference. Consequently neither the Committee Reports nor any of the earlier history deals with it. The Conference Report (91 Cong. Rec. 1357) does not comment on the proviso, and the House approved the Report without debate (91 Cong. Rec. 1395-1396). The sole discussion of the proviso occurred in the Senate debate on the Conference Report. This debate unequivocally demonstrates that: (1) Congress intended the moratorium to give the states time to legislate in the areas covered by the statutes named in the proviso. (2) Congress intended that to the extent the states did so the Federal Trade Commission Act and the other statutes listed in the proviso should not be applicable. (3) Congress rejected the notion that a state cannot effectively regulate interstate insurance transactions having consequences within its borders.

D. The Commission's Theory Would Lead to Constant and Serious Impairment of State Regulation.

To the extent that similar issues have been before the federal courts, the rulings are uniformly inconsistent with

the Commission's view. *North Little Rock Transp. Co. v. Casualty Reciprocal Exchange*, 85 F. Supp. 961 (E. D. Ark. 1949), aff'd. 181 F. 2d 174 (C. A. 8, 1950), cert. den. 340 U. S. 823; *Crafts v. Federal Trade Commission*, 244 F. 2d 882 (C. A. 9, 1957), reversed on other grounds, 355 U. S. 9; *Miley v. John Hancock Mutual Life Ins. Co.*, 148 F. Supp. 299 (D. Mass., 1957), aff'd. 242 F. 2d 758 (C. A. 1, 1957), cert. den. 355 U. S. 828. In each instance, the court has either held or strongly implied that under this proviso state regulation renders the federal statutes inapplicable. In no instance did the court suggest that the states could not effectively regulate interstate insurance transactions.

The Commission refers to due process limitations as exemplified by the line of cases beginning with *Allgeyer v. Louisiana*, 165 U. S. 578 (1897), and points out that the McCarran Act did not remove these limitations. At no time, however, has the due process clause in any way prevented a state from regulating transactions originating elsewhere but having consequences within its borders. Even at the time of *Allgeyer*, it was consistently held that a state could regulate a contract with a foreign insurance corporation if the contract was executed within the state. *Hooper v. California*, 155 U. S. 648 (1895); *Nutting v. Massachusetts*, 183 U. S. 553 (1902). And the more modern cases establish beyond doubt the power of a state consistent with the due process clause to regulate insurance transactions affecting its citizens even though interstate commerce is involved and even though the regulation may have extra-state repercussions. *Osborn v. Ozlin*, 310 U. S. 53 (1940); *Hoopeston Canning Co. v. Cullen*, 318 U. S. 313 (1943); *Robertson v. California*, 328 U. S. 440 (1946); *Watson v. Employers Liability Assurance Corp.*, 348 U. S. 66 (1954); *McGee v. International Life Ins. Co.*, 355 U. S. 220 (1957).

E. The Statutes of the State of Nebraska Regulate in a Thorough and Comprehensive Manner All of the Insurance Business Activities of the Association Everywhere.

All of the business of the Association is regulated comprehensively and extensively by Nebraska law.

Sec. 44-101, Nebraska Insurance Code, R. S. Nebraska Reissue of 1952, admonishes insurance companies to "abstain from deceptive or misleading practices", this provision having been on the statute books of Nebraska since the year 1913.

Secs. 44-1501, et seq., being Nebraska Fair Trade Practice Act sets up thorough comprehensive provisions and machinery for their enforcement, including anti-false advertising provisions. This Act applies to all kinds of insurance.

In addition, Nebraska in 1957 amended its Fair Trade Practice Act eliminates any question that a company domiciled in Nebraska shall not engage in unfair methods of competition or in unfair or deceptive acts and practices in the conduct of the business of insurance in any other state.

Additional enforcement procedures for stopping and punishing improper practices of insurance companies are contained in Sec. 44-125.

Secs. 44-137.01 to 44-137.10 contain the Uniform Service of Process Act, enacted in practically every state, under the terms of which a policyholder may maintain an action at his own place of domicile irrespective of whether the insurance company is licensed and has designated an agent for service of process in the state.

Secs. 44-710, et seq. contain the standard provisions laws prescribing the form and provisions of accident and health policies.

Sec. 44-710.02 prescribes the reciprocal power of insurance regulatory authority in states other than Nebraska, which may be exercised through the Nebraska Director of Insurance.

Secs. 44-750 to 44-752 forbid misleading or deceptive advertising by Nebraska companies anywhere and everywhere, with specific reference to sickness and accident insurance.

The foregoing laws are mostly quoted in full elsewhere in this record and the present brief will not be unduly lengthened by repetitious quotations.

It was these Nebraska statutes which the court below had in mind where the majority opinion of the Eighth Circuit said:

> "Moreover, we think the Director of Insurance of Nebraska at all times here involved had the power to regulate the practice of the petitioner (Travelers Health Association) in the solicitation of insurance in Nebraska and other states."

Among the many court decisions holding that the state of domicile may police acts beyond the borders of the states, follow:

Hoopeston Canning Co. v. Cullen, 318 U. S. 313, (1943), involved the validity of certain provisions of the New York Insurance Law applicable to foreign reciprocals affecting business activities carried on outside the state of New York. The court said in part:

"Where as here the state has full power to prescribe the forms of contract, the terms of protection of the insured, and the type of reserve funds needed 'the mere fact that state action may have repercussions beyond states lines is of no judicial significance'. Osborn v. Ozlin, supra, at 62. Neither New York nor Illinois loses the power to protect the interests of its citizens because these associations carry on activities in both places."

In *Watson v. Employer's Liability Assurance Corporation*, 348 U. S. 66 (1954), which involved Louisiana's direct action statutes, the Supreme Court had no difficulty in finding sufficient interest in the state of the forum to permit extraterritorial application of the state's regulations.

Hammond Packing Company v. Arkansas, 212 U. S. 322 (1908), involved the constitutionality of an Arkansas Anti-Trust Law which prohibited any domestic or foreign corporation from participating in any conspiracy against trade, whether such conspiracy "affects or is intended to affect prices or rates in Arkansas or not." Appellant was a foreign corporation charged with the commission of acts outside of the state in violation of the statute; the court necessarily had to pass on the validity of extraterritorial provision of the statute as applied to domestic corporations. The court concluded that the statute could validly be applied to the extraterritorial operations of domestic corporations.

Two other decisions supporting the proposition that the states have authority to regulate the practices of their domestic insurers, even though such regulation involves the policing of acts done beyond the borders of the state of domicile, are *Alaska Packers Association v. Industrial*

Accident Commission, 294 U. S. 532 (1935) and *Osborn v. Ozlin*, 310 U. S. 53 (1940).

It is clear from the foregoing that the business of insurance is thoroughly and comprehensively regulated by Nebraska State Law, within the meaning of the McCarran Act, supra.

F. The Other States Have Regulatory Power.

In addition to the authority of Nebraska to regulate its home domiciled company in everything it does everywhere, the decision of this court in *Travelers Health v. Virginia*, 339 U. S. 643, indicates that every other state whose citizens receive its advertising material may also regulate. This Court there said: "Traditional notions of fair play and substantial justice" require that the contracts of an out-of-state insurance company doing business by mail are sufficient to subject the company to cease and desist proceedings under the state's Blue Sky Law.

It was pointed out that the policyholder's ability to sue where normally a judgment *in personam* would not be rendered on constructive service by mail, was not necessarily the measure of the *state's* power to *regulate*. This decision held that the State of Virginia could *regulate* Travelers, a Nebraska domiciled company, and could and did issue a cease and desist order against it.

CONCLUSION

The McCarran Act, plus the court decisions interpreting it, forcefully settle the following points:

That Congress intended and provided that the con-

tinued regulation and taxation by the states of *all* of the insurance business is in the public interest.

Congress had full knowledge of the fact that the various states had established a comprehensive system of regulation and taxation of insurance, and that regulatory features and techniques had been used which had not been applied generally to other interstate business. Congress placed the entire weight of its power behind such state systems. Congress drew no distinctions between interstate and intrastate business. Existing and future state systems of regulation and taxation, in the established manner, were validated, preserved, encouraged and supported. Congress knew the states exclusively had regulated direct mail business.

Congress eliminated the possibility of misunderstandings through implications or speculation and plainly required that *no* Congressional Act should be construed to invalidate, impair or supersede any state regulatory or tax law, unless such Congressional Act specifically relates to insurance.

Congress enumerated various existing acts such as the Sherman Act, etc., and provided precisely which of such acts should apply, and when, if ever, they should apply, to the business of insurance.

Insurance companies domiciled in Nebraska are subject to a comprehensive and forceful insurance code and departmental regulations which are aplicable to all activities conducted by such company. Thereby, in all its aspects including solicitation of prospects by direct mail, the insurance business of Travelers Health Association is regulated by state law.

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX "A"

RULES GOVERNING ADVERTISEMENTS OF ACCIDENT AND SICKNESS INSURANCE

WHEREAS the insurance laws of this State and particularly (refer to specific sections of law) prohibit the transmission of information in the form of advertisements or otherwise in such a manner or of such substance that the insurance buying public may be deceived or misled thereby; and

WHEREAS said insurance laws establish only general standards by which advertisements in the field of individual, group, blanket and franchise accident and sickness insurance should be prepared, disseminated and regulated; and,

WHEREAS it is considered proper and desirable to implement and interpret the general statutory standards and to adopt proper procedures to expedite enforcement thereof by this office; now therefore

IT IS ORDERED that the following standards for advertisements of such accident and sickness insurance as well as the administrative and enforcement procedures hereafter enumerated be and are hereby adopted as a formal and official rule (ruling) of this Department:

Section 1.

Definitions

A. *An advertisement* for the purpose of these rules shall include:

(1) printed and published material and descriptive literature of an insurer used in newspapers, maga-

zines, radio and TV scripts, billboards and similar displays; and

(2) descriptive literature and sales aids of all kinds issued by an insurer for presentation to members of the public, including but not limited to circulars, leaflets, booklets, depictions, illustrations, and form letters; and

(3) prepared sales talks, presentations and material for use by agents and brokers, and representations made by agents and brokers in accordance therewith.

B. *Policy* for the purpose of these rules shall include any policy, plan, certificate, contract, agreement, statement of coverage, rider or endorsement which provides accident or sickness benefits, or medical, surgical or hospital expense benefits, whether on a cash indemnity, reimbursement, or service basis, except when issued in connection with another kind of insurance other than life, and except disability and double indemnity benefits included in life insurance and annuity contracts.

C. *Insurer* for the purpose of these rules shall include any individual, corporation, association, partnership, reciprocal exchange, inter-insurer, Lloyds, fraternal benefit society, and any other legal entity engaged in the advertisement of a policy as herein defined.

D. These rules shall also apply to agents and brokers to the extent that they are responsible for the advertisement of any policy.

Section 2.

Advertisements in General

Advertisements shall be truthful and not misleading in fact or in implication. Words or phrases the meaning of which is clear only by implication or by familiarity with insurance terminology shall not be used.

Section 3.

Advertisements of Benefits Payable, Losses Covered or Premiums Payable

A. *Deceptive Words, Phrases or Illustrations*

Words, phrases or illustrations shall not be used in a manner which misleads or has the capacity and tendency to deceive as to the extent of any policy benefit payable, loss covered or premium payable. An advertisement relating to any policy benefit payable, loss covered or premium payable shall be sufficiently complete and clear as to avoid deception or the capacity and tendency to deceive.

Explanation:

(1) The words and phrases "all," "full," "complete," "comprehensive," "unlimited," "up to," "as high as," "this policy will pay your hospital and surgical bills" or "this policy will replace your income," or similar words and phrases shall not be used so as to exaggerate any benefit beyond the terms of the policy, but may be used only in such manner as fairly to describe such benefit.

(2) A policy covering only one disease or a list of specified diseases shall not be advertised so as to imply coverage beyond the terms of the policy. Synonymous terms shall not be used to refer to

any disease so as to imply broader coverage than is the fact.

(3) The benefits of a policy which pays varying amounts for the same loss occurring under different conditions or which pays benefits only when a loss occurs under certain conditions shall not be advertised without disclosing the limited conditions under which the benefits referred to are provided by the policy.

(4) Phrases such as "this policy pays $1,800 for hospital room and board expenses" are incomplete without indicating the maximum daily benefit and the maximum time limit for hospital room and board expenses.

B. *Exceptions, Reductions and Limitations*

When an advertisiment refers to any dollar amount, period of time for which any benefit is payable, cost of policy, or specific policy benefit or the loss for which such benefit is payable, it shall also disclose those exceptions, reductions and limitations affecting the basic provisions of the policy without which the advertisement would have the capacity and tendency to mislead or deceive.

Explanation:

(1) The term "exception" shall mean any provision in a policy whereby coverage for a specified hazard is entirely eliminated; it is a statement of a risk not assumed under the policy.

(2) The term "reduction" shall mean any provision which reduces the amount of the benefit; a risk of loss is assumed but payment upon the occurrence of such loss is limited to some amount or

period less than would be otherwise payable had such reduction clause not been used.

(3) The term "limitation" shall mean any provision which restricts coverage under the policy other than an exception or a reduction.

(4) *Waiting, Elimination, Probationary or Similar Periods*

When a policy contains a time period between the effective date of the policy and the effective date of coverage under the policy or a time period between the date a loss occurs and the date benefits begin to accrue for such loss, an advertisement covered by Section 3B shall disclose the existence of such periods.

(5) *Pre-existing Conditions.*

(a) An advertisement covered by Section 3B shall disclose the extent to which any loss is not covered if the cause of such loss is traceable to a condition existing prior to the effective date of the policy.

(b) When a policy does not cover losses traceable to pre-existing conditions no advertisement of the policy shall state or imply that the applicant's physical condition or medical history will not affect the issuance of the policy or payment of a claim thereunder. This limits the use of the phrase "no medical examination required" and phrases of similar import.

Section 4.

Necessity for Disclosing Policy Provisions Relating to Renewability, Cancellability and Termination

An advertisement which refers to renewability, cancellability or termination of a policy, or which refers to a policy benefit, or which states or illustrates time or age in connection with eligibility of applicants or continuation of the policy, shall disclose the provisions relating to renewability, cancellability and termination and any modification of benefits, losses covered or premiums because of age or for other reasons, in a manner which shall not minimize or render obscure the qualifying conditions.

Section 5.

Method of Disclosure of Required Information

All information required to be disclosed by these rules shall be set out conspicuously and in close conjunction with the statements to which such information relates or under appropriate captions of such prominence that it shall not be minimized, rendered obscure or presented in an ambiguous fashion or intermingled with the context of the advertisement so as to be confusing or misleading.

Section 6.

Testimonials

Testimonials used in advertisements must be genuine, represent the current opinion of the author, be applicable to the policy advertised and be accurately reproduced. The insurer, in using a testimonial, makes as its own all of the statements contained therein, and the advertisement including such statements is subject to all of the provisions of these rules.

Section 7.

Use of Statistics

An advertisement relating to the dollar amounts of claims paid, the number of persons insured, or similar statistical information relating to any insurer or policy shall not be used unless it accurately reflects all of the relevant facts. Such an advertisement shall not imply that such statistics are derived from the policy advertised unless such is the fact.

Section 8.

Inspection of Policy

An offer in an advertisement of free inspection of a policy or offer of a premium refund is not a cure for misleading or deceptive statements contained in such advertisement.

Section 9.

Identification of Plan or Number of Policies

A. When a choice of the amount of benefits is referred to, an advertisement shall disclose that the amount of benefits provided depends upon the plan selected and that the premium will vary with the amount of the benefits.

B. When an advertisement refers to various benefits which may be contained in two or more policies, other than group master policies, the advertisement shall disclose that such benefits are provided only through a combination of such policies.

Section 10.

Disparaging Comparisons and Statements

An advertisement shall not directly or indirectly make un-

fair or incomplete comparisons of policies or benefits or otherwise falsely disparage competitors, their policies, services or business methods.

Section 11.

Jurisdictional Licensing

A. An advertisement which is intended to be seen or heard beyond the limits of the jurisdiction in which the insurer is licensed shall not imply licensing beyond those limits.

Section 12.

Identity of Insurer

The identity of the insurer shall be made clear in all of its advertisements. An advertisement shall not use a trade name, service mark, slogan, symbol or other device which has the capacity and tendency to mislead or deceive as to the true identity of the insurer.

Section 13.

Group or Quasi-group Implications

An advertisement of a particular policy shall not state or imply that prospective policyholders become group or quasi-group members and as such enjoy special rates or underwriting privileges, unless such is the fact.

Section 14.

Introductory, Initial or Special Offers

An advertisement shall not state or imply that a particular policy or combination of policies is an introductory, initial or special offer and that the applicant will receive advantages by accepting the offer, unless such is the fact.

Section 15.

Approval or Endorsement by Third Parties

A. An advertisement shall not state or imply that an insurer or a policy has been approved or an insurer's financial condition has been examined and found to be satisfactory by a governmental agency, unless such is the fact.

B. An advertisement shall not state or imply that an insurer or a policy has been approved or endorsed by any individual, group of individuals, society, association or other organization, unless such is the fact.

Section 16.

Service Facilities

An advertisement shall not contain untrue statements with respect to the time within which claims are paid or statements which imply that claim settlements will be liberal or generous beyond the terms of the policy.

Section 17.

Statements About an Insurer

An advertisement shall not contain statements which are untrue in fact or by implication misleading with respect to the insurer's assets, corporate structure, financial standing, age or relative position in the insurance business.

Special Enforcement Procedures for Rules Governing the Advertisement of Accident and Sickness Insurance

(1) *Advertising File:* Each insurer shall maintain at its home or principal office a complete file containing every printed, published or prepared advertisement of

individual policies and typical printed, published or prepared advertisements of blanket, franchise and group policies hereafter disseminated in this or any other state whether or not licensed in such other state, with a notation attached to each such advertisement which shall indicate the manner and extent of distribution and the former number of any policy advertised. Such file shall be subject to regular and periodical inspection by this Department. All such advertisements shall be maintained in said file for a period of not less than three years.

(2) *Certificate of Compliance:* Each insurer required to file an annual statement which is now or which hereafter becomes subject to the provisions of this rule (ruling) must file with this Department together with its annual statement, a certificate executed by an authorized officer of the insurer wherein it is stated that to the best of his knowledge, information and belief the advertisements which were disseminated by the insurer during the preceding statement year complied or were made to comply in all respects with the provisions (of the insurance laws of this State as implemented and interpreted by this rule—ruling) (of this rule—ruling). It is requested that the chief executive officer of each such insurer to which this rule (ruling) is addressed acknowledge its receipt and indicate its intention to comply therewith.

Effective date of this rule (ruling) 90 days from date hereof.

Dated this ---- day of ----------, 1955.

Signature ---------------------

Adopted by the National Association of Insurance Commissioners on December 1, 1955, and amended December 3, 1956.

NOTE: In Nebraska, this is Departmental Rule 22, effective April 12, 1956.

IN THE

Supreme Court of the United States

October Term, A. D. 1959.

No. 51

FEDERAL TRADE COMMISSION,

Petitioner,

vs.

TRAVELERS HEALTH ASSOCIATION,

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF OF ATTORNEY GENERAL OF ILLINOIS, AMICUS CURIAE

GRENVILLE BEARDSLEY,
Attorney General of Illinois,
State House,
Springfield, Illinois.

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IN THE

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OCTOBER TERM, A. D. 1959.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF ATTORNEY GENERAL OF ILLINOIS, AMICUS CURIAE.

PRELIMINARY STATEMENT.

The State of Illinois and its Insurance Department are vitally interested in the issue presented by this case. The Director of Insurance of the State of Illinois, in a communication to the Attorney General, of October 28, 1959 stated:

"The Insurance Department of the State of Illinois, as are all of the insurance regulatory officials, is vitally concerned in the persistent conflict between the States and the Federal Government over the regulation of the business of insurance. Our Department sincerely believes in the position of the Travelers Health Association and would deeply appreciate your assistance in this matter in the filing of a brief."

Some of the conflict referred to by the Director has ended. In *Federal Trade Commission* v. *National Casualty Co.*, 357 U. S. 560, (1958) this Court held that the McCarran-Ferguson Act "withdrew from the Federal Trade Commission the authority to regulate respondents' advertising practices in those states which are regulating those practices under their own laws." The *National Casualty* case concerned advertising material shipped in bulk to agents who distributed the material locally. Only an insubstantial amount of advertising in that case went by mail from the company to the public. This Court stated, "Respondents' advertising programs require distribution by their local agents, and there is no question but that the States possess ample means to regulate this advertising within their respective boundaries".

Subsequent to the Court's decision in the *National Casualty Company* case, the Court of Appeals for the Eighth Circuit decided *Travelers Health Association* v. *Federal Trade Commission*, 262 F. 2d, 241 (C. of A. 8th, January 13, 1959), now before this Court on certiorari. This case represents a remaining portion of the area of conflict between the states and the Federal Government over the regulation of the business of insurance.

The Travelers Health Association is a Nebraska corporation, licensed in Nebraska and Virginia. It does business only by direct mail in all states. Its advertising is mailed from Nebraska. It issues its policies and receives its pre

miums in Nebraska. Its claims are filed, serviced and paid in Nebraska. Nebraska has a statute providing as follows:

> "No person shall engage in this state in unfair methods of competition or in unfair or deceptive acts and practices in the conduct of the business of insurance. *No person domiciled in or resident of this state shall engage in unfair methods of competition* or in unfair or deceptive acts and practices *in the conduct of the business of insurance in any other state*, territory, possession, province, country or district." (Italics supplied.) (Section 44-1503 of Reissue Revised Statutes of Nebraska, 1943, as amended by the emergency Act of May 14, 1957 (Laws of Nebraska 1957, c. 191, §2)).

The Federal Trade Commission asserted jurisdiction over the Travelers Health Association. The Court below denied jurisdiction. The majority opinion stated, "With every activity of the petitioner, in the conduct of its business, subject to the supervision and control of the Director of Insurance of Nebraska, we think that the petitioner's practices in the solicitation of insurance by mail in Nebraska or elsewhere reasonably and realistically cannot be held to be unregulated by state law . . . We think that the advertising practices of the petitioner are regulated by state law within the letter and spirit of the McCarran-Ferguson Act, and that the Act has placed such practices beyond the regulatory power of the Commission".

The minority opinion favored jurisdiction of the Federal Trade Commission on the ground that to force citizens of other states to rely on Nebraska's regulation of out-of-state advertising was impractical and ineffective. Therefore, the Federal Trade Commission had jurisdiction under the McCarran Act.

What interest has the State of Illinois in this issue?

Prior to the decision in *United States v. Southeastern Underwriter's Ass'n*, 322 U. S. 533, regulation of insurance was left exclusively to the States. The business of insurance was not considered to be in interstate commerce. Federal legislation dealing with interstate commerce did not apply to the business of insurance. The *Southeastern Underwriters* case held that the business of insurance was in interstate commerce. This caused Chief Justice Stone in his dissenting opinion to state that the action of the majority in overturning the precedents of seventy-five years "cannot fail to be the occasion for loosing a flood of litigation and of legislation, state and national, in order to establish a new boundary between state and national power raising questions which cannot be answered for years to come".

To counter Justice Stone's admonition and to prevent chaotic regulation, Public Law 15, known as the McCarran Act, was passed and signed by the President on March 9, 1945, expressing the intent of Congress "that the continued regulation and taxation by the several states of the business of insurance is in the public interest". The Act, in Section 2(a), provided, "The business of insurance and every person engaged therein shall be subject to the laws of the several states which relate to the regulation or taxation of such business". Section 2(b) of the Act, in the so-called "proviso clause", stated, "That after June 30, 1948 . . . the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent such business is not regulated by state law".

Illinois statutory provisions comprehensively regulate advertising practices and other phases of the insurance business. This traditional state function was returned to Illinois and other states by the McCarran Act. Where necessary to conform to the McCarran Act, regulatory legisla-

tion dealing with unfair competition and misleading advertising have been adopted by the States. In *Prudential Insurance Company v. Benjamin*, 328 U. S. 408, the purpose and effect of the McCarran Act was stated by this Court as follows: "Obviously Congress' purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance . . . its purpose was evidently to throw the whole weight of its power behind the state systems. . . ."

In this case Illinois has an ample state system for regulating the interstate direct mail business of insurance in question. So has Nebraska. Possible dual regulation with the Federal Trade Commission and constant haggling between State and federal authority over jurisdiction on thousands of different factual situations was not intended by Congress. Yet the position of the Federal Trade Commission in this case would lead to just that. Illinois hopes that the argument which follows will be helpful to the Court in arriving at a decision sustaining traditional state regulation of the business of insurance.

SUMMARY OF ARGUMENT.

In the *National Casualty Company* case the Federal Trade Commission sought to regulate "interstate phases" of the insurance business where advertising went primarily to agents in states where the insurer was licensed. This Court denied the Federal Trade Commission jurisdiction.

Here the Federal Trade Commission seeks to regulate the "interstate phases" of the mail order insurance business. The advertising goes direct to the public in states where the insurer is not licensed. The issue presented is: Is such insurance business regulated by the state laws in question so that the Federal Trade Commission has no jur-

isdiction under the "proviso clause" of the McCarran Act? The State of Illinois contends that, considering the events prior to the McCarran Act, the express language of the Act, its legislative background and the statutes involved, the Federal Trade Commission may not regulate the insurance business in question. Not only may Nebraska under its statutes constitutionally regulate the insurance business in question in Nebraska and its interstate activities elsewhere, but each state whose citizens have contact with the advertising in question may regulate it under applicable statutes. Under such circumstances, this Court should deny the jurisdiction sought by the Federal Trade Commission as the practices in question are regulated by state law.

ARGUMENT

I.

THE HISTORY OF THE McCARRAN ACT (PUBLIC LAW 15), ITS EXPRESS LANGUAGE AND BACKGROUND CLEARLY INDICATE THAT THE FEDERAL TRADE COMMISSION WAS NOT TO REGULATE THE BUSINESS OF INSURANCE IN QUESTION.

A. THE HISTORY BEHIND THE McCARRAN ACT.

The McCarran Act (15 U. S. C., §1011-1015) was enacted as a result of the decision of the U. S. Supreme Court in *United States v. Southeastern Underwriters Association*, 322 U. S. 533. This decision placed the insurance business in interstate commerce when transacted between citizens and corporations of different states. Traditionally, the forty-eight states had regulated insurance. The effect of this decision was to extend the authority of the federal government over a segment of the nation's business which heretofore had been regulated exclusively by the individual states.

To clarify the conflict and confusion resulting from the decision, it was necessary for Congress to determine to what extent the Federal Government should occupy the field, if at all. Congress, by the McCarran Act, returned to the states the regulation of the business of insurance.

The McCarran Act was entitled by Congress as "An Act to express the intent of Congress with reference to the regulation of the business of insurance." The intent of Congress was further revealed in the preamble to the Act, which declares that "The continued regulation and taxation by the several states of the business of insurtnce is in the pub-

lic interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several states".

In *Prudential Insurance Co.* v. *Benjamin*, 328 U. S. 408, the U. S. Supreme Court found that the purpose of the McCarran Act was as follows:

> "Obviously Congress' purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance * * * Congress must have had full knowledge of the nation wide existence of state systems of regulation and taxation * * * Congress could not have been unacquainted with these facts and its purpose was evidently to throw the whole weight of its power behind the state systems * * *".

The Federal Trade Commission, therefore, has a primary duty to carry out the purpose and spirit of the McCarran Act, which, as found above, is "to give support to existing and future state systems for regulating" insurance. Any jurisdictional conflict with this duty should be resolved so that jurisdiction asserted by the Commission does not violate the basic purpose of the McCarran Act. In *Baltimore Contractors* v. *Bodinger*, 348 U. S. 176, this principle was clearly stated as follows: "It is the responsibility of all courts to see that no unauthorized extention or reduction of jurisdiction, direct or indirect, occurs in the federal system".

B. THE EXPRESS LANGUAGE OF THE PROVISO CLAUSE.

Having considered the basic purpose of the McCarran Act, let us now analyze the specific jurisdiction given to the Commission by that Act.

After declaring that Congressional acts (unless specifically relating to insurance) shall not "invalidate, im-

pair or supersede" state regulatory acts, the McCarran Act declares, in the so-called "Proviso Clause", that "the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by state law". Under this proviso clause the Commission asserts jurisdiction over the Nebraska insurer in the present cause.

What is the meaning to be placed on the proviso clause? The express language of the clause gives the Federal Trade Commission jurisdiction "only to the extent that such business is not regulated by state law". No "interstate phases" of state regulation are singled out for the Commission's jurisdiction, nor is regulation conferred upon the Commission if it might decide that the states are not effectively regulating. The grant of jurisdiction to the Commission is given only when the states have not by law regulated the insurance business in question.

A brief review of the legislative history of the proviso clause discloses that the bill originally passed the Senate as S. 340 on January 25, 1945, and expressly excluded the Federal Trade Commission Act. The bill was then sent to the House of Representatives. There, certain members objected to the exclusion of the Federal Trade Commission Act. The bill was amended in various respects before being adopted as Public Law 15 by both the Senate and the House. One of the amendments consisted of the language employed in the proviso clause, as set forth above.

Apparently there was no debate on the amendments in the House. In the Senate, however, a discussion of the three year moratorium and its relationship to the proviso clause is reported in 91 Cong. Rec., 1442/44 and 1477/88. Senator McCarran's remarks on this subject, in part, are as follows:

> Mr. McCarran: "During the Moratorium regulatory acts must be enacted by the several states in each of

the several states. Otherwise, the anti-trust acts become effective after January 1, 1948."

* * * * * *

Mr. Murdock: "So that during the Moratorium it is intended, is it not, that the states shall affirmatively step into the regulations of the insurance business?"

Mr. McCarran: "That is correct."

Mr. McCarran: "The Moratorium would not be continued, but if in the meantime the states themselves had regulated the business of insurance, the Sherman Act and Clayton Acts and the other acts would not become effective."

From the foregoing it definitely appears that Senator McCarran was of the opinion that the proviso clause would become a "dead letter" if the states were regulating the "business of insurance". The Nebraska statute in the present case leaves no doubt that the state is regulating the business of insurance in question.

Congress did not have to create a three year moratorium suspending the application of the Federal Trade Commission Act to the insurance business. The only possible meaning of the moratorium is that Congress wanted the states to regulate the practices set forth in the Federal Trade Commission Act and gave them a three year period to enact necessary legislation. If Congress wanted to regulate in its entirety, the proviso clause and moratorium would never have been included in the McCarran Act.

The common sense meaning of the proviso clause must be considered in light of the language expressed in the entire Act. So considered, it is clear that Congress preferred state regulation. The limitation placed by Congress on its own power is not to be extended, but is to be construed in favor of state regulation, and the Nebraska statute in the present case.

II

NEBRASKA UNDER ITS STATUTES REGULATES IN A CONSTITUTIONAL MANNER THE INSURANCE BUSINESS IN QUESTION BOTH IN NEBRASKA AND IN ITS INTERSTATE ACTIVITIES ELSEWHERE.

A. THE STATUTES.

No need exists to set forth again the Nebraska statutes before the Court. Its Fair Trade Practices Act, as amended in 1957, prohibits unfair methods of competition and unfair or deceptive practices in Nebraska and forbids such practices by a Nebraska domiciled insurance company "in any other state, territory, possession, province, country or district". Rule 22 of the Nebraska Insurance Department, prescribing rules for advertising of accident and sickness insurance, supplements its statute. A comprehensive state plan of regulation is before the Court. The Federal Trade Commission does not argue that the Nebraska regulation in question is a mere pretense. It concedes that Nebraska may regulate the practices in question in its own borders. But then it finds that regulation of the interstate activities of the Nebraska company cannot displace the Federal Trade Commission's jurisdiction (Brief, p. 22).

Such an argument, of course, cannot deny the existence of a comprehensive state plan of regulation in the precise field sought to be usurped by the Federal Trade Commission. When Congress preempts the field, in this instance for the states after the McCarran Act, federal legislation covering the precise subject, interstate activities of a Nebraska domiciled insurance company, should fall. See *Townsend v. Yeomans*, 301 U. S. 441 (1937); *Union Brokerage Co. v. Jensen*, 322 U. S. 202.)

B. **CONSTITUTIONAL AND OTHER CONSIDERATIONS.**

While preferring to argue the proposition that the interstate insurance practices in question are not regulated by state law (Brief, 11), the Federal Trade Commission is forced to argue that Nebraska's statute as applied to the interstate activities in question is unconstitutional. Under the facts, it is to be noted that the end result of the so-called deceptive advertising is a contract entered into in Nebraska where the premiums are received, policies issued and claims paid. No doubt should exist under the present state of the law that Nebraska's statute meets the test of constitutionality. This Court, in *Travelers Health Association v. Virginia*, 339 U. S. 643, (1950) recognized Virginia's right to subject an unlicensed Nebraska company to Virginia's Blue Sky Law. Essentially a state's power to protect its citizens was recognized despite the extra-territorial implications. Here the protection of non-resident prospective policyholders is at issue with the domiciliary state laws amply providing the protection. Nebraska by its statutes gives extra-territorial protection to all non-resident insureds.

What constitutional principles are involved?

Osborn v. Ozlin, 310 U. S. 53 (1940) (Virginia could require policies to be written through resident agents); *Hoopeston Canning Co. v. Cullen*, 318 U. S. 313 (concerned validity of New York insurance law applicable to foreign reciprocals and affecting business activities outside of New York); and *Travelers Health Association v. Virginia*, 339 U. S. 643 (1950) (facts above), establish "that the mere fact that state action may have repercussion beyond state lines is of no judicial significance". State regulatory action affecting "business activities which are carried on outside the

state" was sustained as being within the "constitutional power of the state".

In *Prudential Insurance Co.* v. *Benjamin*, 328 U. S. 408, the McCarran Act, returning regulation of insurance to the states, was discussed as follows:

> "Obviously Congress' purpose was broadly to give support to the existing and future state systems for regulating . . . the business of insurance."

Here, Nebraska has passed a statute which is a part of the future state system for regulating the business of insurance referred to in the *Benjamin* case. It regulates extra-territorially the advertising practices of a Nebraska company. As stated above, "The mere fact state action may have repercussions beyond state lines is of no judicial significance".

When a Nebraska corporation engages in extra-territorial activities, the laws of Nebraska become part of its charter. (See *Relf* v. *Rundle*, 103 U. S. 222 (1881) (Claimants impliedly agreed when contracting with a Missouri corporation that if the corporation were dissolved under Missouri law, the Missouri Superintendent of Insurance should represent the company in all suits instituted by them affecting the wind-up of the corporation). The Nebraska statutes are engrafted into *Travelers Health Association's* charter by the reserve power of the state constitution giving Nebraska the right to regulate the activities of its own corporations wherever such activities are carried on. In *Hammond Packing Company* v. *Arkansas*, 212 U. S. 322, (1908) this Court stated, "The chartered right to do a particular business did not deprive the state of its lawful police authority and, therefore, the franchise to do the business was inherently qualified by the duty to execute the chartered powers conformably to such police regulations as might thereafter be adopted in the interest of the public welfare."

When the McCarran Act returned traditional regulation of insurance to the states, state authority was not lacking for extra-territorial enforcement of state regulatory laws. In Illinois, two cases decided by our Supreme Court illustrate the point:

In *Chicago Mut. Life Indemnity Assn.* v. *Hunt*, 127 Ill. 257 (1889), the Attorney General filed an information against the Association. Among the allegations made against the Association was that its printed advertisements and circulars "greatly exaggerated" the amount of insurance or indemnity covered by the policies, that they were "intended and used for general circulation and were calculated to and did deceive the public". The actual decision of the Court was not based on any consideration of the Association's advertising practices, but it is worthy to note that even as early as 1889 Illinois was regulating advertising practices affecting "the public".

The fact that advertising was circulated outside the boundaries of Illinois did not bar regulation of such advertising by the state of Illinois.

In *North American Ins. Co.* v. *Yates*, 214 Ill. 272 (1905), the Insurance Superintendent filed a bill to enjoin 20 foreign fire insurance companies, none of whom were licensed to operate in Illinois, from maintaining their offices in Chicago. It was alleged that the companies did "everything in the way of fire insurance other than to insure property situated in this state" (Illinois), and that "this manner of doing business is a trick and device to evade the insurance laws of this state and all other states and is illegal". The companies challenged the jurisdiction of the Court. The Court said:

"The public policy of this state touching insurance companies is amply attested by over forty designated

statutes * * *. Regulation of such companies is the chief object of all such statutes. That this is so is evidenced alike by the title of the acts and their various provisions. It may be that one of the objects, and the main one, of so regulating these corporations is the protection of the citizens of the state. But this is not the only object. * * * We have hundreds of domestic insurance corporations organized under our law doing business in this state and other States, and hundreds of other foreign companies licensed under and complying with the laws of our state and doing business within the state, and *the State is concerned in the maintenance of a standard of security and fair dealing, according to the prescribed regulation for all.* All those organized under our laws and those licensed and complying with our laws are in a sense citizens of our state, and are entitled to the protection of the law against companies doing business in this state, contrary to its laws * * * and so managed * * * that the business (is) brought into ill-repute." (Emphasis supplied.)

Likewise, other state courts have recognized the doctrine that state insurance regulations have an interstate and extra territorial effect. In *In Re Stoddard,* 238 N. Y. 147 (1924), an alien insurance company was being liquidated. The Court stated: "The superintendent is not, therefore, to take possession of the property solely for the benefit of creditors or policyholders in this state or in the United States, but for the interest of *all its policyholders,* creditors and stockholders *wherever they may be*". (Emphasis supplied.) (See also *State ex rel. European Acc. Ins. Co. v. Tomlinson,* 101 Ohio St. 459 (1921), where a company's license was revoked in Ohio for violation of Ohio laws because of acts committed in the State of New York, and *Rhode Island Insurance Co. v. Downey,* 212 Pac. (2nd) 965 (1950), where a Rhode Island company, technically insolvent under California law, had its license revoked in California because the California Insurance Commissioners did not approve a merger with an Indiana Company.)

The foregoing cases involving the extra territorial effect of state insurance laws clearly indicate that state authority has been exercised, not only to prevent illegal practices committed within its own state boundaries, but throughout the entire United States. State courts place no territorial limitation on state insurance commissioners to prevent the exercise of their discretion in regulating domestic companies, foreign companies, or companies operating in a state "by sufferance".

From the foregoing it is evident that Nebraska's statutes constitutionally regulate the phases of the insurance business before the Court, and that state regulation of interstate activities of domestic insurers was in the field prior to the McCarran Act. Subsequent thereto it has covered the field.

In grasping for some straw upon which to base a claim for unconstitutionality of the Nebraska statute, the Federal Trade Commission (Brief, 26) conjures up a situation where a Nebraska corporation would violate the statute by mailing from Kansas misleading representations to Kansas, Oregon, or New Jersey. Such a case is not before the Court. Only Nebraska mailings are at issue, and the end result—namely a contract of insurance—no matter where the mailings are, is a contract made in Nebraska.

Having dealt with the Nebraska statutes domestically and extra territorially, we believe it will be helpful to the Court to consider just what Illinois could do if its citizens were, in the language of the Federal Trade Commission's brief, "bombarded by misleading representations sent through the mails". (Brief, p. 20.)

III.

ILLINOIS AND OTHER STATES MAY REGULATE THE BUSINESS OF INSURANCE IN QUESTION.

Before coming to the issue as to what measures Illinois may adopt, we must assume that Nebraska officials have not performed their statutory duties, (See *Hentschel v. Fidelity & Deposit Co.*, 87 F. 2d 833 (1937) (Missouri Superintendent of Insurance presumed to have performed his duty); *Anderson v. Madsen Inv. Co.*, 72 F. 2d 768 (1934)), and that the statutory powers given evidently "were a mere pretense". This view was rejected by the Court in the *National Casualty* case. References hereafter to Illinois would include any other state.

A. RETALIATION.

Illinois, as most states, has a retaliation statute (Ill. Rev. Stats. (1959) Ch. 73, §1057). It is primarily directed to equate taxation and regulation. It seldom is necessary in the relationship among the States to invoke the remedy of retailiation. If, after a request from Illinois, Nebraska did not take steps under its statutes to correct the advertising practices complained of, Illinois, by its retaliation statute might jeopardize, cancel and disrupt the normal relationship with Nebraska insurers doing business in Illinois. Retaliation under the Illinois statute would first, however, require that Nebraska "refuse to permit any insurance company incorporated or organized under the laws (of Illinois) to transact business according to its usual plan in (Nebraska)". The "usual plan" of an Illinois insurer may well encompass the fact that Nebraska enforces its statutes.

B. SUIT BY THE ILLINOIS DIRECTOR OF INSURANCE TO ENFORCE APPLICABLE ILLINOIS STATUTES AGAINST THE NEBRASKA INSURER.

No doubt exists that Illinois may regulate the practices complained of under Illinois statutes and that Illinois has jurisdiction over the Nebraska insurer. *Travelers Health Association* v. *Virginia*, 339 U. S. 643.

Section I of Article IV of the Federal Constitution provides, "Full faith and credit shall be given in every state to the public acts, records and judicial proceedings of every other state". Giving full faith and credit to the Nebraska statute would enable an Illinois action on this statute.

The Federal Trade Commission in its brief admits that a state other than Nebraska might enter a valid injunction order or impose a fine or penalty (Brief, p. 33). Its concern is directed to the enforcement of the judgment. Such concern is based on the premise that Nebraska would not enforce such a judgment. Should the judgment or decree be taken by the Director of Insurance individually on behalf of all Illinois policyholders, it may well be that the Federal Court in Nebraska would enforce it. See *Milwaukee County* v. *M. E White Co.*, 296 U. S. 268 (1935). Enforcement of a judgment or decree in the Nebraska courts has all the benefits of the full faith and credit clause. See *Morris* v. *Jones*, 329 U. S. 545 (1947) (Missouri judgment against defunct insurer valid against Illinois receiver. Judgment may not be contested in receivership proceeding.)

To block enforcement of a decree or judgment Nebraska would have to assert as an affirmative defense the so-called rule that it would not enforce the "penal laws" of another jurisdiction, when its own law would be supplemented by the precise enforcement involved. We doubt that Nebraska

would take such a position. If it did, this Court would ultimately have to decide when, under such circumstances, enforcement of a "penal" statute was involved. Should the judgment or decree be based on Nebraska's law, Nebraska would be in the anomalous position of claiming it wouldn't enforce a judgment or decree based on its own law.

CONCLUSION.

Any company subjected to all the Nebraska law, the Illinois law, and the laws of other states, as pointed out above, certainly is "regulated by state law". This Court should so find and deny the Federal Trade Commission's asserted jurisdiction over the Nebraska insurer in question, and the judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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